EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

(10)

No. 85-2099-CSY
Status: GRANTED

Docketed:
June 20, 1986

Title: Pennsylvania, Petitioner
v.
Dorothy Finley

Court: Superior Court of Pennsylvania,
Philadelphia Office

Counsel for petitioner: Barthold, Gaele McLaughlin

Counsel for respondent: Harper, Catherine M.

Entry	Date	Note	Proceedings and Orders
1	Jun 20 1986	G	Petition for writ of certiorari filed.
3	Jul 10 1986		Order extending time to file response to petition until August 4, 1986.
4	Aug 4 1986		Brief of respondent Dorothy Finley in opposition filed.
5	Aug 4 1986	G	Motion of respondent for leave to proceed in forma pauperis filed.
6	Aug 6 1986		DISTRIBUTED. September 29, 1986
7	Oct 6 1986		Motion of respondent for leave to proceed in forma pauperis GRANTED. Justice Scalia DUT.
8	Oct 6 1986		Petition GRANTED. Justice Scalia DUT.
			**********
10	Oct 13 1986		Order extending time to file brief of petitioner on the merits until November 28, 1986.
11	Oct 21 1986	G	Motion of respondent for appointment of counsel filed.
12	Oct 24 1986		DISTRIBUTED. Oct. 31, 1986. (Motion of respondent for appointment of counsel).
13	Nov 3 1986		Motion for appointment of counsel GRANTED and it is ordered that Catherine M. Harper, Esq., of Lansdale, Pennsylvania, is appointed to serve as counsel for the respondent in this case.
14	Nov 20 1986		Joint appendix filed.
15	Nov 20 1986		Brief of petitioner Pennsylvania filed.
16	Nov 26 1986		Brief amicus curiae of Indiana, et al. filed.
18	Dec 10 1986		Order extending time to file brief of respondent on the merits until January 13, 1987.
19	Oct 12 1987		Record filed.
20	Jan 13 1987		Brief amicus curiae of Natl. Legal Aid Defender Assn. filed.
21	Jan 13 1987		Brief amicus curiae of ACLU, et al. filed.
22	Jan 15 1987		SET FOR ARGUMENT. Monday, March 2, 1987 (2nd case).
23	Jan 13 1987		Brief of respondent Dorothy Finley filed.
24	Jan 22 1987		CIRCULATED.
25	Feb 17 1987	X	Reply brief of petitioner Pennsylvania filed.
26	Mar 2 1987		ARGUED.

85-2099

NO. _____

IN THE SUPREME COURT
OF THE UNITED STATES

OCTOBER TERM, 1986

COMMONWEALTH OF PENNSYLVANIA,
Petitioner

v.

DOROTHY FINLEY,
Respondent

**PETITION FOR WRIT OF CERTIORARI
TO THE SUPERIOR COURT OF PENNSYLVANIA**

GAELE McLAUGHLIN BARTHOLD
Deputy District Attorney
(Counsel of Record)
ANN C. LEBOWITZ
Assistant District Attorney
RONALD EISENBERG
Chief, Appeals Division
WILLIAM G. CHADWICK, JR.
First Asst. District Attorney
RONALD D. CASTILLE
District Attorney
Philadelphia County

1300 Chestnut Street
Philadelphia, Pa., 19107
(215) 875-6010

June 20, 1986

65pp

QUESTIONS PRESENTED

1. Does an indigent criminal defendant's sixth amendment right to a meaningful first appeal pursuant to Anders v. California, 386 U.S. 738 (1967), extend to state court collateral review proceedings?

2. Where defendant's conviction was affirmed by the Pennsylvania Supreme Court in a counselled direct appeal, and newly appointed counsel found no issues on which to base a subsequent claim for collateral relief, do the sixth and fourteenth amendments require appointed counsel to file an advocate's brief or petition with the post-conviction hearing judge?

3. Are indigent criminal defendants, who have no federal constitutional right to counsel on collateral review, entitled to compel post-conviction litigation of claims which appointed counsel deems non-meritorious?

TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES

NO. _____

IN THE SUPREME COURT
OF THE UNITED STATES

OCTOBER TERM, 1986

COMMONWEALTH OF PENNSYLVANIA,
Petitioner

v.

DOROTHY FINLEY,
Respondent

PETITION FOR WRIT OF CERTIORARI
TO THE SUPERIOR COURT OF PENNSYLVANIA

Petitioner, the Commonwealth of Pennsylvania, respectfully requests that a Writ of Certiorari issue to review the final Judgment and Opinion of the Superior Court of Pennsylvania, which is the highest state court to render a decision on the merits of this case.

The Pennsylvania Superior Court entered its decision on June 22, 1984. Petitioner then timely applied to the Pennsylvania Supreme Court for discretionary state court

review. Petitioner's application was initially granted, and the case was fully briefed and argued at the October 1985 Session of the Pennsylvania Supreme Court. Thereafter, by Order dated April 23, 1986, the Pennsylvania Supreme Court inexplicably dismissed the appeal as "improvidently granted" (Order attached as Appendix A at 1A-2A). Because under Pennsylvania law this was not a decision on the merits, Commonwealth v. Britton, 506 A.2d 895 (Pa. 1986); Dayton v. Dayton, 506 A.2d 901 (Pa. 1986); Commonwealth of Pennsylvania Liquor Control Board v. Ronnie's Lounge, Inc., 485 Pa. 72, 400 A.2d 1317 (1979), the writ of certiorari, if allowed, is appropriately directed to the intermediate state appellate court. See e.g. Pennsylvania v. Henderson, 446 U.S. 905 (1980).

OPINIONS BELOW

The Opinion and Judgment of the Pennsylvania Superior Court, which is officially reported at 330 Pa. Superior Ct. 313, is set forth in full in Appendix B at 1B-19B. The Opinion of the Philadelphia Court of Common Pleas, which was filed on February 22, 1983, but is unreported, is set forth in full in Appendix C at 1C-14C.

STATEMENT OF JURISDICTION

The Judgment of the Superior Court of Pennsylvania was entered on June 22, 1984. The Pennsylvania Supreme Court, by Order entered April 23, 1986, declined to exercise authority in the case.[1]

---

[1]The Judgment on which review is sought was entered by a three-judge panel of the Pennsylvania Superior Court. Pursuant to this Court's decision in Local 174, Teamsters v. Lucas Flour Company, 369 U.S. 95, 89-100 (1962), the judgment of a panel or division of the appropriate appellate court is reviewable on certiorari if

(Footnote 1 continued on next page.)

The jurisdiction of this Court to review the judgment of the Superior Court of Pennsylvania is invoked pursuant to 28 U.S.C. §1257(3).

(Footnote 1 continued from previous page.) that was the highest state court in which a decision could be had. Under Pennsylvania practice, cases are heard before the Superior Court en banc or by a panel "as determined by the court in its discretion." Pa.R.A.P. 3721. There is no right to reargument of a panel decision before the en banc court, Pa.R.A.P. 3723, nor is a request for en banc reargument a prerequisite to discretionary review in the state supreme court. Pa.R.A.P. 1113. Since the state supreme court ultimately declined to review this case, the Superior Court panel is the highest state court in which a decision on the federal questions could be had. American Railway Express Co. v. Levee, 263 U.S. 19 (1923); Interstate Circuit, Inc. v. City of Dallas, 390 U.S. 676, 678 n.1 (1968).

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Amendment Six, which provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial ... and to have the assistance of counsel for his defense.

United States Constitution, Amendment Fourteen, which provides:

> ... No state shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

Respondent was convicted of second-degree murder in this 1975 drug related homicide wherein the victim was shot and killed inside his home. Respondent, represented by court-appointed counsel,

successfully litigated a pre-trial motion to suppress the statements she made to police on the night of her arrest. Respondent's motion to suppress the murder weapon, which was seized from her apartment pursuant to a search warrant, was denied. Following disposition of these pre-trial motions, respondent's case was listed for trial before a judge unfamiliar with the contents of the suppressed evidence. Respondent then waived her right to a jury trial.

After a lengthy bench trial at which counsel presented several witnesses on respondent's behalf, the trial judge resolved the credibility issues adversely to respondent and convicted her of second-degree murder, robbery, criminal conspiracy and weapons offenses. Still represented by her appointed trial counsel, respondent

appealed to the state supreme court.[2] That court, rejecting the arguments raised in counsel's full brief on the merits, unanimously affirmed the judgment of sentence. Commonwealth v. Finley, 477 Pa. 211, 383 A.2d 898 (1978).

Respondent next filed a pro se Post Conviction Hearing Act petition in the Philadelphia Court of Common Pleas. Respondent's post-conviction petition raised precisely the same issues previously rejected by the state supreme court on direct appeal. Because the issues had been finally litigated under former 19 P.S. §1180-4, reenacted as 42 Pa.C.S.A. §9544, the Common Pleas Court summarily denied respondent's petition without a hearing and without the appointment of counsel. Respondent, through new appointed counsel,

---

[2]Under prior Pennsylvania practice, the state supreme court had direct appellate jurisdiction in homicide cases.

again appealed to the state supreme court. This appeal did not identify any substantive claims of error. Respondent, however, successfully argued that the lower court erred when it summarily denied post-conviction relief without appointing counsel. The state supreme court remanded the case to the Court of Common Pleas with instructions to determine whether respondent was indigent and, if so, to appoint counsel for proceedings under the Post Conviction Hearing Act. Commonwealth v. Finley, 497 Pa. 332, 440 A.2d 1183 (1981), reargument denied.

Pursuant to this state supreme court directive, the lower court, on remand, appointed new post-conviction counsel. Respondent's new attorney reviewed the notes of testimony and consulted with his client. Based on his advocate's review of the record, new counsel concluded that there was no even arguable basis for

collateral relief. Counsel so advised the court by letter and requested permission to withdraw from the case. Counsel's letter also advised the court regarding the two finally litigated claims which respondent wished to pursue.

Upon receipt of counsel's letter, the post-conviction court conducted its own independent review of the case and similarly concluded that the record was devoid of arguably meritorious issues under the state Post Conviction Hearing Act. The post-conviction judge specifically refused to compel appointed counsel to present frivolous collateral claims. The court reasoned that such a requirement debases the legal profession, undermines the integrity of the judicial system, and fails to benefit the indigent defendant. The Common Pleas Court thus permitted counsel to withdraw, and dismissed respondent's Post Conviction Hearing Act petition.

Respondent, through yet another appointed counsel, appealed this dismissal to the Pennsylvania Superior Court. On June 22, 1984, a panel of that court remanded the case for further post-conviction proceedings on the ground that prior post-conviction counsel had failed to comply with the technical requirements of Anders v. California, 386 U.S. 738 (1967). The state supreme court subsequently declined to exercise its discretionary authority in the case.

Because Anders is inapplicable to collateral attacks on criminal convictions, and because there is no constitutional mandate for the litigious merry-go-round sanctioned by the court below, the Commonwealth of Pennsylvania now seeks this Court's review.

REASONS FOR GRANTING THE WRIT

THIS CASE PRESENTS AN IMPORTANT OPPORTUNITY TO DECIDE A QUESTION LEFT OPEN BY THE COURT'S DECISION IN ANDERS V. CALIFORNIA AND DEFINITIVELY TO INSTRUCT THE STATE COURTS THAT ANDERS IS INAPPLICABLE TO COLLATERAL PROCEEDINGS.

In Anders v. California, 386 U.S. 738 (1967), this Court, endorsing a policy of withdrawal from frivolous cases, established specific briefing and notice requirements to insure that indigent criminal defendants would have a meaningful right to counsel in a first state court appeal.[3] Anders, however, does not address the issue of appointed counsel's responsibilities where he seeks to withdraw on collateral review. This case presents the issue left undecided by Anders.

---

[3] See Polk County v. Dodson, 454 U.S. 312, 323 (1981), where this Court expressed the view that retained and appointed lawyers have the same professional obligation not to pursue frivolous motions and appeals.

Pennsylvania, slavishly adhering to a misguided tendency to declare all rights absolute, Ross v. Moffitt, 417 U.S. 600, 611-612 (1974), here wrongly extended the Anders direct appeal requirements to collateral review of respondent's well-founded murder conviction, despite the fact that respondent had already been afforded a counselled direct appeal on the merits.[4] In thus applying Anders where it is inapplicable, the state court ordered an unwarranted remand for additional post-conviction proceedings because respondent's

---

[4]The Pennsylvania decision below relies exclusively on this Court's interpretation of the federal constitution in the Anders case, and on state cases which, in turn, are based on federal precedent. See Commonwealth v. Lohr, 503 Pa. 130, 468 A.2d 1375 (1983); Commonwealth v. McClendon, 495 Pa. 467, 434 A.2d 1185 (1981); Commonwealth v. Baker, 429 Pa. 209, 239 A.2d 201 (1968). Even where state grounds are intermixed in a lower court's holding, the state court's reliance on federal grounds warrants review by this Court. Oregon v. Kennedy, 456 U.S. 667 (1982).

new court-appointed attorney, having concluded that there were no even arguably meritorious issues on which he could assert a claim for collateral relief, failed to follow Anders' irrelevant formal requirements.

Under Anders, counsel seeking to withdraw from an appeal he deems frivolous must supply the reviewing court with an advocate's brief "referring to anything in the record that might arguably support the appeal." Anders at 744. By imposing these formal requirements, Anders thus guaranteed that an indigent's then recently recognized constitutional right to counsel in a first state court appeal, Douglas v. California, 372 U.S. 353 (1963), would not become an empty ritual. There is, however, no similar constitutional right to counsel on collateral review of a criminal conviction. Evitts v. Lucey, 105 S.Ct. 830, 834 (1985) (right to counsel limited to first appeal

as of right); Ross v. Moffitt, 417 U.S. 600. Hence, neither Anders nor its due process underpinnings are applicable here.[5]

Moreover, insofar as Anders is grounded on the equal protection clause, subsequent decisions abundantly demonstrate that the states have no constitutional obligation to duplicate for indigents the same legal

---

[5]Of course, the states may choose as a matter of state law to provide counsel to indigents even on collateral review. Under Pennsylvania procedural rules, indigent defendants have an absolute right to appointed counsel on the first post-conviction petition, and in subsequent petitions which raise new issues. Pa.R.Crim.P. 1503 and 1504. Since this right to counsel is based only on state law, the formal requirements mandated by Anders do not apply as a matter of constitutional principle. Rather, if the state decides to require some certification that counsel has fulfilled his role as an advocate, it may do so in any manner it deems appropriate -- even a "no merit" letter to the judge. Finally, because Pennsylvania imposes no limit on the number of post-conviction petitions which a convicted defendant may file, a defendant who believes he has been slothfully represented by his post-conviction counsel can simply address a new petition to the court.

arsenal available to the wealthy. Ross v. Moffitt, 417 U.S. at 616. See Nichols v. Gagnon, 454 F.2d 467, 472 (7th Cir. 1971), cert. denied, 408 U.S. 925 (1972) (Stevens, J.) ("Every defendant does not have the constitutional right to be represented by Clarence Darrow."); Slawek v. United States, 413 F.2d 957, 960 (8th Cir. 1969) (Blackmun, J.) (fact that rich defendants may waste money on unnecessary and foolish trial steps, does not give the indigent the right to squander government funds).

Furthermore, a review of so-called "Anders practice," as it has evolved in several states, demonstrates that its requirements must be clarified and limited, not augmented. Indeed, while one commentator has described Pennsylvania's Anders practice as particularly "opaque," Hermann, "Frivolous Criminal Appeals," 47 N.Y.U.L. Rev. 701, 708 n.39 (1972),

lucidity is not the hallmark of Anders practice anywhere.[6]

Anders has been severely criticized by defense counsel, whose clients were

---

[6]There are relatively few reported decisions concerning Anders' applicability on collateral review. Of the reported decisions, the most notable is a Seventh Circuit case in which former Associate Justice Clark, who authored Anders, was sitting by designation as a Circuit Judge. United States ex rel. Curtis v. People of Illinois, 521 F.2d 717 (7th Cir. 1975), cert. denied, 423 U.S. 1023 (1975). The former Justice there joined an opinion which unequivocally states that Anders applies only in direct appeals. That case is also significant because Illinois, like Pennsylvania, has encountered considerable difficulty in reconciling the Anders criteria as applied on post-conviction review. Although Illinois has more recently refused to extend Anders to collateral proceedings, People v. McCarly, 17 Ill.App.3d 796, 308 N.E.2d 655 (1974), and has even explicitly rejected the Pennsylvania view, People v. Townsell, 14 Ill.App.3d 105, 302 N.E.2d 213 (1973), its decisions have not been uniform. People v. Belville, 94 Ill.App.2d 286, 236 N.E.2d 760 (1968) (Anders applicable to post-conviction attack on guilty plea). See also State v. Thompson, 139 Ariz. 552, 679 P.2d 575 (1984) (Anders applicable to collateral proceedings when defendant requests delayed appeal).

intended to benefit from the decision.[7] Various state courts have been no less critical. In fact, a number of jurisdictions simply refuse to accept Anders briefs and will not entertain petitions to withdraw, no matter how frivolous the case. Thus, in Colorado, Idaho, Massachusetts and Missouri, counsel must brief every case on the merits, regardless of counsel's assessment of frivolity.[8]

---

[7]According to one career defender, the "schizophrenic" briefing requirements of Anders encourage frivolous appeals, undermine the integrity of the in forma pauperis bar, promote intellectual dishonesty, and delay appellate review of meritorious claims. Doherty, "Wolf! Wolf! -- The Ramifications of Frivolous Appeals," 59 Journal of Criminal Law, Criminology, and Police Science, No. 1, pp. 1-3 (1968). See also Hermann, "Frivolous Criminal Appeals," 47 New York University Law Review 701 (1972).

[8]Colorado: McClendon v. People, 174 Colorado 7, 481 P.2d 715 (1981) (public defender has no right to withdraw); Idaho: State v. McKenney, 98 Idaho 551, 568 P.2d 1213 (1977) (requires brief on the merits;

(Footnote 8 continued on next page.)

While this approach has the apparent advantage of easing the task of the state appeals courts, it has been soundly criticized by at least one current member of this Court, then a Circuit Court judge, as an ill-conceived interpretation of Anders that wrongly endorses an "advocate's charade." Nickols v. Gagnon, 454 F.2d 467, 472 (4th Cir. 1971) (Stevens, J.).

This advocate's charade, and the resulting influx of frivolous litigation,

---

(Footnote 8 continued from previous page.)

no instance where counsel has been permitted to withdraw based on frivolity of appeal); Massachusetts: Commonwealth v. Moffitt, 383 Mass. 201 (1981) (even if an appeal is frivolous, court will expend less time and energy in direct review on the merits; counsel not permitted to withdraw on grounds of frivolousness, but may dissociate himself by so stating in preface); Missouri: State v. Gates, 466 S.W. 2d 681 (Mo. 1971) (court will not grant application to withdraw on grounds of frivolousness; requires briefs on merits). See also Indiana: Dixon v. State, 152 Ind.App. 430, 284 N.E.2d 102 (1972), partially overruled in Music v. State, 489 N.E.2d 949 (Ind. 1986).

must be resolved. The Anders dilemma has yielded such conflicting state court decisions, and has created such a crisis of confidence in the appellate courts that have considered the issue, that this Court must providence guidance. At a minimum, Pennsylvania's unwarranted extension of the Anders criteria to collateral proceedings must now be corrected.[9]

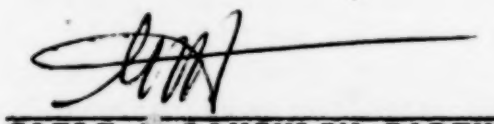
---

[9]On June 11, 1986, the Pennsylvania Superior Court again extended Anders beyond its facial limits by applying Anders requirements to an appeal from a violation of probation. Commonwealth v. Aaron Thomas, No. 436 Philadelphia, 1982, Pa. Superior, slip opinion, filed 6/11/86. Such an ill-considered constitutionally-based enlargement of Anders should not be tolerated. Maybe Pennsylvania practice is especially opaque. See p.15, above.

CONCLUSION

For all the foregoing reasons, the Commonwealth of Pennsylvania respectfully requests that a Writ of Certiorari issue to review the decision below.

Respectfully submitted,



GAELE McLAUGHLIN BARTHOLD
Deputy District Attorney
(Counsel of Record)
ANN C. LEBOWITZ
Assistant District Attorney
RONALD EISENBERG
Chief, Appeals Unit
WILLIAM G. CHADWICK, JR.
First Asst. District Attorney
RONALD D. CASTILLE
District Attorney
Philadelphia County

1300 Chestnut Street
Philadelphia, Pa. 19107
(215) 875-6010

IN THE SUPREME COURT
OF THE UNITED STATES

COMMONWEALTH OF PENN- SYLVANIA, Petitioner	:	OCTOBER TERM, 1986
v.	:	
DOROTHY FINLEY, Respondent	:	NO.

CERTIFICATION OF SERVICE

I, GAELE McLAUGHLIN BARTHOLD, Counsel for Petitioner, hereby certify that on this 20th day of June, 1986, three (3) copies of this Petition for Writ of Certiorari to the Superior Court of Pennsylvania were mailed, postage prepaid, to Catherine M. Harper, Esquire, 800 East Main Street, Lansdale, Pennsylvania 19446, Counsel for Respondent.

GAELE McLAUGHLIN BARTHOLD
Deputy District Attorney
District Attorney's Office
1300 Chestnut Street
Philadelphia, Pa. 19107

Sworn to and subscribed :
before me this 20th day :
of June, 1986, A.D. :

NOTARY PUBLIC

My Commission Expires: 9/19/87

SUPREME COURT OF PENNSYLVANIA

Eastern District

COMMONWEALTH OF PENNSYLVANIA, Appellant	:	No. 14 E.D. Appeal Docket, 1985
v.	:	
DOROTHY FINLEY, Appellee	:	

J U D G M E N T

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the appeal having been improvidently granted, the same is hereby dismissed.

BY THE COURT:

/s/
Marlene F. Lachman, Esq.
Prothonotary

Dated: April 23, 1986

J#154-85
IN THE SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

COMMONWEALTH OF PENNSYLVANIA, Appellant	:	No. 14 E.D. Appeal Dkt. 1985
	:	
	:	Commonwealth's Appeal by Permission from the June 22, 1984 Decision of the Superior Court at No. 2978, Philadelphia, 1982, Remanding for an Evidentiary Hearing under the Post-Conviction Hearing Act as of Nos. 1128-1132, May Session, 1975, Philadelphia Court of Common Pleas, Criminal Trial Division
v.	:	
	:	330 Pa. Superior Ct. 313, 479 A.2d 568 (1984)
	:	
DOROTHY FINLEY, Appellee	:	ARGUED: October 23, 1985

ORDER

PER CURIAM **FILED: APRIL 23, 1986**

Appeal dismissed as having been improvidently granted.

J. 17005/84

COMMONWEALTH OF PENNSYLVANIA	:	IN THE SUPERIOR COURT OF PENNSYLVANIA
v.	:	
DOROTHY FINLEY, Appellant	:	No. 02978 Philadelphia 1982

J U D G M E N T

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the above captioned matter, of the Court of Common Pleas of PHILADELPHIA County be, and is REMANDED WITH DIRECTIVES.

By the Court:

/s/
J. Daniel Henry
Prothonotary

Dated: June 22, 1984

J. 17005/84

COMMONWEALTH OF PENNSYLVANIA	:	IN THE SUPERIOR COURT OF PENNSYLVANIA
v.	:	
DOROTHY FINLEY, Appellant	:	No. 02978 Philadelphia 1982

Appeal from the Order of the Court of Common Pleas, Criminal Division, of Philadelphia County at No. 1128-1132 May Term, 1975.

BEFORE: ROWLEY, POPOVICH AND CERCONE, JJ.

OPINION BY POPOVICH, J.: **FILED JUNE 22 1984**

This is an appeal from an order of the Court of Common Pleas of Philadelphia denying the Petition for Relief under the Post-Conviction Hearing Act (PCHA), 42 Pa.C.S.A. 9541 et seq., of appellant, Dorothy Finley. On October 17, 1975, after a non-jury trial, appellant was convicted of murder in the second degree, robbery, carrying firearms without a license, possessing instruments

of crime, prohibited offensive weapon and criminal conspiracy. Since the convictions involved a homicide, direct appeal was taken to the Pennsylvania Supreme Court, where all the judgments of sentence were affirmed by Per Curiam Opinion at Commonwealth v. Finley, 477 Pa. 211, 383 A.2d 898 (1978). On appeal to the Supreme Court, appellant raised two issues: (1) whether there was sufficient evidence to support the verdicts and (2) whether the search warrant was based on illegally obtained evidence rendering the evidence obtained pursuant thereto inadmissible. The Supreme Court "found no merit in either of these arguments." Commonwealth v. Finley, supra, p. 898.

On April 9, 1979, appellant filed a pro se PCHA petition which merely repeated the allegations raised in direct appeal to the Pennsylvania Supreme Court. This PCHA petition was denied without a hearing and

without appointment of counsel because "[i]n the instant petition the petitioner again raises the precise issues previously raised on appeal...." Opinion, Blake, J., at 2. Subsequently, an appeal of the decision of the PCHA court was taken to the Pennsylvania Supreme Court which vacated the lower court order and remanded the case to the lower court with instructions that counsel be appointed for appellant if she were found to be indigent. In compliance with that Order, Michael A. Seidman, Esquire, of Philadelphia, was appointed counsel for appellant. Mr. Seidman concluded that no arguably meritorious issues existed for appellant in her PCHA petition, whereupon he was instructed by the lower court to adopt the following procedure:

> Counsel was instructed that where he had completed a comprehensive review of the entire record and the applicable law, and had interviewed defendant and concluded that the record

> was devoid of arguably meritorious contentions, counsel should write this court in letter form detailing not only the nature and extent of his review, but also listing each issue Defendant wished to have raised, followed by an explanation why those issues were meritless. At that point, this Court would conduct its own independent review and, if our conclusions coincided with counsel's the Petition would be dismissed without a hearing and the Defendant would be apprised of her appellate rights. Opinion Blake, J. at 5.

Counsel adhered to those guidelines and wrote the following letter to the court:

> I have reviewed the Notes of Testimony in the above matter and I have met with the defendant to discuss her Post Conviction Hearing Act Petition. I cannot find any issues to raise on her behalf that are of arguable merit. In addition, my client, Mrs. Finley, did not find any issues that she wished to raise other than the issues raised in her pro se petition. One of these issues deals with the sufficiency of the evidence. The Commonwealth's evidence consisted primarily of eyewitness testimony. The sufficiency of that testimony was a matter of credibility which was decided against the defendant by the waiver Judge. The other

> issue involved the search warrant which was finally litigated on direct appeal to our Supreme Court. See 383 A.2d 898 (1978). Consequently, I respectfully request to be relieved of my appointment in this matter.

Mr. Seidman was thereafter relieved, and the Petition was dismissed. New counsel was appointed to represent appellant in the instant appeal from that order.

In this appeal, appellant claims that she was denied effective assistance of counsel where the PCHA court-appointed counsel, Mr. Seidman, failed to file an amended PCHA petition and brief on behalf of his client and chose instead to outline for the court reasons why a PCHA petition would be meritless. We hold that the procedure followed below resulted in ineffectiveness of counsel. Accordingly, we vacate the order below and remand for present counsel to represent appellant in the filing of an amended PCHA petition.

Pennsylvania law concerning procedures to be followed when a court-appointed attorney sees no basis for an appeal is derived from the seminal case of Anders v. California, 386 U.S. 738, 87 S.Ct. 1396 (1967) rehrg. denied at 388 U.S. 924, 87 S.Ct. 2094. The Court in Anders applied a three-pronged formula, which, if scrupulously applied, will allow court-appointed counsel to withdraw from a case. If the attorney, after a conscientious evaluation of the record, finds his case to be "wholly frivolous", he may so advise the court and request permission to withdraw. He must, however, accompany his request with a brief referring to anything in the record which will "arguably" support an appeal. A copy of that brief should then be furnished to the indigent within enough time to allow the latter to pursue an appeal, either counselled or pro se. The court, after a full examination of the record, then decides

whether the case is wholly frivolous; and, if it so finds, it may grant counsel's request to withdraw. The procedure outlined above allows for the situation where counsel believes an appeal would be wholly frivolous but concurrently provides safeguards for the right of an indigent to enjoy the same zealous representation available to defendants able to afford private counsel.

Anders was adopted in Pennsylvania in Commonwealth v. Baker, 429 Pa. 209, 239 A.2d 201 (1968), wherein Anders was read as offering two choices to the court-appointed advocate: (1) he may file briefs and argue the case on behalf of his client as an advocate; or (2) he may choose to withdraw his services, in which case he must adhere to the Anders procedure.

Baker involved an appeal to the Supreme Court after relief was denied by our court. The instant case, however, arises from

appellant's initial PCHA petition. The threshold inquiry must be, therefore, whether Anders applies; if we answer affirmatively, only then may we evaluate whether its requirements are met.

Commonwealth v. Lohr, ___ Pa. ___, 468 A.2d 1375 (1983) arose as a result of appellant's filing a second PCHA petition after the time for appeal from the Superior Court's denial of relief from his first PCHA petition had passed. The Superior Court had affirmed the dismissal, without hearing, of appellant's second PCHA petition, and the appellant proceeded pro se to the Supreme Court armed, inter alia, with a fresh claim of ineffectiveness, which the Court chose to address. Appellant contended that appointed PCHA counsel was ineffective in failing to amend appellant's first pro se post-conviction petition and in failing adequately to pursue, as ordered, an appeal to the

Supreme Court. The majority prescribed application of Commonwealth v. McClendon, 495 Pa. 467, 434 A.2d 1185 (1981) in a case where counsel believes appeal is frivolous.

McClendon was a direct appeal where the court held that the requirements of Anders must be met. The Court felt obliged to determine whether the lower court was correct in its assessment of complete frivolity. It was only after it made that determination that the Court inquired as to whether the brief submitted complied with Anders. Under the circumstances, it found that compliance was unnecessary.[1] In affirming, the Court says

> "[t]he major thrust of Anders was to assure a careful assessment of any available claims that an indigent might have. That end is achieved by requiring counsel to conduct an exhaustive examination

---

[1] See page [14B], infra.

> of the record and by also placing the responsibility on the reviewing court to make an independent determination of the merit of the appeal.... Once we are satisfied with the accuracy of counsel's assessment of the appeal as being wholly frivolous, counsel has fully discharged his responsibility." at 1188.

Although the Court in Lohr held that counsel's actions were outside the requirements of McClendon, in which the court echoes Anders, it, nevertheless, affirmed, stating that

> "... the goal pursued by McClendon, review of the merit of the appeal, is fulfilled by the instant review, negating the possibility of prejudice inuring to appellant from the omissions of counsel. Furthermore, notwithstanding counsel's dereliction, any relief this Court might extend to appellant would be merely duplicitous [sic] of the instant review and, thus, consistent with principles of judicial economy, we decline the opportunity to remand for proceedings consistent with McClendon." (Emphasis added) at 1379.

Anders has been applied in similar circumstances, and, therefore, we hold

that its application to the instant case is proper. Counsel's brief does not satisfy the requirements of Anders in that it does not set forth any issues of arguable merit, nor is there evidence that it was provided to appellant within enough time for her to proceed pro se or to obtain new counsel. Notwithstanding these deficiencies, McClendon and Lohr offer us the opportunity to review the merits of the appeal. We decline, however, to follow the procedures utilized in McClendon and Lohr. We take a position which distinguishes this case from Lohr, based in part on the rationale behind the Supreme Court's remand for appointment of counsel.

The Supreme Court remanded, not because it saw any particular merit to the two contentions at issue, which were identical to those disposed of earlier in appellant's direct appeal. The Court stated, in remanding appellant's first

PCHA appeal, "[c]ounsel for a PCHA petitioner can more ably explore legal grounds for complaint, investigate underlying facts, articulate claims for relief and promote efficient administration of justice." Commonwealth v. Finley, 497 Pa. 332, 440 A.2d 1183, 1184 (1981). The Supreme Court wished to afford appellant the opportunity to amass other issues with arguable merit. It is obvious that the issues listed by appellant in her pro se petition were meritless as they had previously been so described by the Pennsylvania Supreme Court. Moreover, Pa.R. Crim.P. 1504, in affording counsel, means that counsel should act as an advocate in fulfilling his role.

> "... it is not enough simply for the PCHA court to appoint counsel. For this settled rule 'also envisions that counsel so appointed shall have the opportunity and in fact discharge the responsibilities required by representation.'" Commonwealth v. Lowenberg, 493 Pa.

231, 425 A.2d 1100 (1981) quoting from Commonwealth v. Fiero, 462 Pa. 409, 413, 341 A.2d 448, 450 (1975).

Fiero involved an appellant-authored PCHA petition filed after counsel was appointed and prior to which there had been no direct appeal taken. Since counsel had neither amended the petition nor filed a brief, the court held that "[t]hese facts compel the conclusion that the proceeding was in fact uncounselled." Id. at 450. The court required "meaningful participation by counsel."

If we were to hold that the requirements of Anders were not met but concomitantly review the merits of the appeal and possible affirm as in McClendon, we would run into a further obstacle. The affirmance which was the outcome of McClendon was based on the "accuracy of counsel's assessment of the appeal", including "an exhaustive examination of the record",

Commonwealth v. McClendon, supra, at 1188.

Here, there is no mention of an exhaustive search nor the required finding that the case is wholly frivolous.[2] Counsel must certify to an exhaustive reading and endeavor to uncover all possible issues for review so that the frivolity of the appeal may be determined by the lower court, or, as in Lohr, at the appellate level.[3]

---

[2] Progeny of Anders have provided us with a continuum of degrees of "meritless". Counsel's request to withdraw may only be granted if the court finds the case to be "wholly frivolous"; it may not be entertained if the appeal merely has "arguable merit" nor if it lacks merit. Mere absence of merit is not enough to support a request to withdraw or the granting of it. Commonwealth v. Greer, 455 Pa. 106, 314 A.2d 513 (1974); Commonwealth v. Worthy, 301 Pa. Super. 46, 446 A.2d 1327 (1982).

[3] It should be noted, in view of the fact that the Lohr Court chose to review the case on the merits, that Lohr involved a second PCHA petition, whereas this case

(Footnote 3 continued on next page.)

In the instant case, notwithstanding the fact that the pro se petition raised identical issues to those raised on direct appeal, we have a mandate from the Supreme Court with express instructions to appoint counsel and allow appellant to "... upon request, amend her petition." This remand carries with it a strengthening obligation to assess the quality of appellant's case in an arena wherein she is accompanied by a zealous advocate.

In accordance with the spirit of Lohr and McClendon and the manner in which they were disposed of on appeal, it should be

---

(Footnote 3 continued from previous page.)

involved the dismissal of the first post-conviction petition. The Court was concerned with considerations of judicial economy. Additionally, the attorney in Lohr apparently submitted a short petition to appellant which he rejected in favor of his own. The issues which he presented are evaluated by the Court.

noted that McClendon reduces the Anders requirements to a pratical level.

> "If ... 'wholly frivolous' means that there are no points present that 'might arguably support an appeal' counsel is saddled with an impossible burden, if he is nevertheless required to file a brief containing arguments that are non-existent. If on the other hand, there are claims of arguable merit, even though counsel may not have any confidence in them, ... the appeal is not 'wholly frivolous' and counsel is not entitled to seek leave to withdraw." Id. at 1188.

Here, without anything more than "the bare record available in the Superior Court" (Appellant's Brief at 19), appellant's present counsel has been able to list several issues which may have arguable merit. It is certainly conceivable that those same issues would have captured the attention of prior counsel upon an "exhaustive" reading of the record. (Indeed, it should be noted that Mr. Seidman only admits to having read

the Notes of Testimony).[4] Here, the "no-merit letter" is insufficient in light of the fact that there appear to be arguably meritorious issues, and the sufficiency of counsel's perusal of the record is not reflected.

It is also possible that appellant was never informed of her right to proceed pro se as she contends she was never given a copy of the letter written by counsel. The court in Commonwealth v. Baker, supra, states that the third requirement of Anders is the most important. "Anders clearly commands ... that the client be given a copy of counsel's brief in time to present the appeal in propria persona." Id. at 203.

---

[4] Moreover, counsel states in his letter that the sufficiency issue was a matter of credibility for the Judge and that the other issue was finally disposed of by the Supreme Court when, in fact, both issues were before that Court.

Since the procedures utilized herein were defective, they acted to deprive appellant of her right to adequate representation. We remand for an evidentiary hearing on the claims raised in appellant's brief and any other issues discerned by counsel after an exhaustive search of the record in accordance with this opinion. Jurisdiction is relinquished.

ROWLEY, J. notes his dissent.

IN THE COURT OF COMMON PLEAS
OF PHILADELPHIA COUNTY

TRIAL DIVISION - CRIMINAL SECTION

COMMONWEALTH OF PENNSYLVANIA	:	MAY TERM, 1975
vs.	:	
DOROTHY FINLEY	:	NOS. 1128-1132

OPINION AND ORDER

BLAKE, J. FILED: February 22, 1983

This matter is before the Court on Defendant's Petition for Relief under the Post Conviction Hearing Act. 42 Pa.C.S.A. 9541 et seq. Following careful review of the entire record and of the applicable law, we are convinced that this Petition must be dismissed after the appointment of counsel and without a hearing.

Defendant was arrested on April 18, 1975 and charged with robbery, carrying firearms on a public street, unlawfully carrying a firearm without a license,

carrying firearms without a license in a vehicle, possessing the instruments of crime generally, possessing a concealed weapon, possessing a prohibited offensive weapon, criminal conspiracy, murder, voluntary and involuntary manslaughter. On October 14, 1975 the Defendant waived her right to trial by jury, immediately proceeded to trial before the Honorable Armand Della Porta and was found guilty of robbery, carrying firearms without a license in a vehicle, possessing the instruments of crime generally, possessing a prohibited offensive weapon, criminal conspiracy, and second degree murder. Timely post-trial motions were heard and denied on February 26, 1976, and the Defendant was sentenced to concurrent terms of not less than ten (10) nor more than twenty (20) years imprisonment on Bill No. 1128, not less than one (1) nor more than two (2) years imprisonment on Bill No. 1130, not less

than five (5) nor more than ten (10) years imprisonment on Bill No. 1131 and a term of life imprisonment on Bill No. 1132. Sentence was suspended on Bill No. 1129.

Defendant pursued an unsuccessful direct appeal to the Supreme Court of Pennsylvania which, on March 23, 1978, affirmed the judgment of sentence, per curiam. Commonwealth vs. Finley, 477 Pa. 211, 383 A.2d 898 (1978).

On April 9, 1979 the Defendant filed, pro se, the instant PCHA Petition for Relief. However, in an Opinion and Order dated September 28, 1979, this Court denied Defendant's Petition without the appointment of counsel and without a hearing, on the ground that the two (2) issues forwarded in the pro se Petition were identical to those raised and denied on direct appeal before the Supreme Court of Pennsylvania, and had therefore been finally litigated under 19

P.S. 1180-4 [now 42 Pa.C.S.A. 9544(A)] of the former PCHA statute.

Defendant pursued a counseled appeal from the denial of PCHA relief to the Superior Court of Pennsylvania which, on May 8, 1980, transferred the appeal to our Supreme Court. On December 24, 1981 our Supreme Court vacated the September 28, 1979 Order of this Court and remanded with "... instructions to determine whether appellant was indigent and if so to appoint counsel. If it is determined that appellant is entitled to the appointment of counsel, she may, upon request, amend her petition." Commonwealth vs. Finley, 497 Pa. 332, 335, 440 A.2d 1183, 1184-85 (1981). A Commonwealth Petition for Reargument was denied on January 29, 1982.

Consequently, this Court complied with the Supreme Court directive and appointed counsel, Michael A. Seidman, Esquire. Mr. Seidman reviewed the Quarter Sessions file,

the notes of testimony, issues of fact and law which Defendant herself had raised, independently reviewed the file and notes for the existence of any additional issues of fact or law which could arguably entitle Defendant to post-conviction relief, and met with Defendant Finley. Upon concluding that absolutely no issues of arguable merit could be found, Mr. Seidman looked to this Court for guidance regarding his duties in this situation.

It had previously been clear that the two issues that Defendant presented in her pro se Petition had been finally litigated to her detriment on direct appeal and, therefore, could not be resurrected in a post-conviction proceeding. 42 Pa.C.S.A. 9544(A)(3).

It is axiomatic that in post-conviction proceedings, counsel cannot be found incompetent or ineffective for failing to raise meritless claims. Commonwealth vs.

Johnson, 490 Pa. 312, 416 A.2d 485 (1980); Commonwealth vs. Hubbard, 472 Pa. 259, 372 A.2d 687 (1977). Counsel's responsible refusal to forward meritless claims preserves the just policy of hearing cases and controversies expeditiously.

A PCHA Court may not only dismiss without a hearing contentions finally litigated [42 Pa.C.S.A. 9544(a)], or waived [42 Pa.C.S.A. 9544(B)], but may also deny and dismiss without a hearing contentions which are "'patently frivolous' and [are] without a trace of support either in the record or from other evidence submitted by the Petitioner." [42 Pa.C.S.A. 9549(B)]. Therefore, it is clear that no PCHA Petitioner, first-time or otherwise, may assert an absolute entitlement to an evidentiary hearing. Commonwealth vs. Hayden, 224 Pa. Super. 354, 356, 307 A.2d 389, 390 (1973).

Instantly, the facts are as follows. Following the above-mentioned remand by

our Supreme Court, court-appointed counsel Seidman reviewed the notes of testimony, Quarter Sessions file, issues of fact and law forwarded by Defendant herself, spoke with Defendant, conducted his own review for contentions which only a trained legal mind would discover, and concluded that no arguably meritorious issues existed. He then sought advice from this Court.

Counsel was instructed that he must take his client as he finds her; that the mere fact of having been appointed to represent a pro se Petitioner could not guarantee the existence of arguable contentions which might entitle the Defendant to post-conviction relief; that acceptance of the responsibility of a court-appointment in no way requires that he "find" an issue (e.g., manufacture an issue or present an issue not arguably meritorious); and that he must proceed as a responsible advocate and exercise his best professional judgment.

Counsel was instructed that where he had completed a comprehensive review of the entire record and the applicable law, and had interviewed Defendant and concluded that the record was devoid of arguably meritorious contentions, counsel should write this Court in letter form detailing not only the nature and extent of his review, but also listing each issue Defendant herself wished to have raised, followed by an explanation why those issues were meritless. At that point, this Court would conduct its own independent review and, if our conclusions coincided with counsel's, the Petition would be dismissed without a hearing and Defendant would be apprised of her appellate rights.

Here, this procedure was followed and the Petition was dismissed without a hearing. Counsel was relieved with new counsel appointed to prosecute the instant appeal.

In Commonwealth vs. Lowenberg, 493 Pa. 232, 425 A.2d 1100 (1981), our equally-divided Supreme Court addressed the issue of the responsibility of court-appointed PCHA counsel upon counsel's determination that no arguably meritorious issues existed. Although the Court's numerous Opinions in Lowenberg's case are without binding precedential value, we find persuasive the statement of Mr. Justice Nix that the landmark case of Anders vs. California, 386 U.S. 738, 87 S.Ct. 1396, 18 L.Ed. 2nd 493 (1976), which outlines to court-appointed counsel the manner in which counsel must proceed as an active advocate, rather than as mere amicus curiae, properly applies to first direct appeals, and implicitly not to collateral attacks such as post-conviction proceedings. 493 Pa. at 239, 425 A.2d at 1101. We also find persuasive the statement of Mr. Justice Flaherty that "the Post Conviction Hearing Act was not intended to

eliminate the finality of criminal convictions by allowing defendants to invoke an endless series of collateral proceedings." 493 Pa. at 236, 425 A.2d at 1102.

Furthermore, in the precedent case of Commonwealth vs. McClendon, 495 Pa. 467, 434 A.2d 1185 (1981), our Supreme Court addressed the issue of what an attorney representing an indigent on direct appeal must do, when the attorney concludes that no arguably meritorious issues exist and then requests permission to withdraw as counsel. The Court was logically and constitutionally compelled to define the roles of the appellate court and of counsel consistent with the holding of Anders vs. California, supra.

The McClendon Court recognized the distinction between issues arguably meritorious yet unlikely to succeed, and issues totally lacking in arguable merit. 495 Pa. at 472-473, 434 A.2d at 1187. The Court

concluded that "... Anders does not require that counsel be forced to pursue a wholly frivolous appeal just because his client is indigent" and that "once we are satisfied with the accuracy of counsel's assessment of the appeal as being wholly frivolous, counsel has finally discharged his responsibility." 495 Pa. at 473, 343 A.2d at 1188.

We agree with the Court's further conclusion that "[T]he role of an advocate, insisted upon in Anders, refers to the manner in which the record was examined in an effort to uncover grounds to support the appeal." 495 Pa. at 473, 343 A.2d at 1188.

With McClendon, supra, in mind, this Court addressed the issue of what appointed counsel representing an indigent must do in a collateral proceeding, where a comprehensive review of the entire record and applicable law, and an interview with Defendant, results in the determination that the PCHA

Petition for Relief is devoid of issues of arguable merit. Under the PCHA Statute, this would occur where counsel finds nothing suggesting a conviction attained, or a sentence imposed, without due process of law (42 Pa.C.S.A. 9542); where neither the Defendant nor the record forwards any contention which, if proven, would establish eligibility for relief (42 Pa.C.S.A. 9543); where all issues have been either finally litigated [42 Pa.C.S.A. 9544(A)]; or waived [42 Pa.C.S.A. 9544(B)]; or where contentions were patently frivolous or fully litigated following an evidentiary hearing at the original trial or at any later proceeding [42 Pa.C.S.A. 9549(B)].

Therefore, following receipt of counsel's letter concluding that arguably meritorious issues were non-existent and listing Defendant's contentions followed by a statement explaining their meritlessness, this Court conducted its independent

review, concurred in counsel's conclusions, and dismissed this Petition without a hearing.

We believe that the aforementioned procedure is wholly consistent with safeguarding the rights of Defendant, the purpose and integrity of post-conviction law and proceedings, and the integrity and professionalism of court-appointed counsel. Furthermore, in so writing this Court following the unsuccessful search for arguably meritorious issues, counsel cannot be criticized for proceeding as mere amicus curiae where, until the end of his investigation, counsel vigorously researched the entire record and applicable law as an advocate in Defendant's behalf. To hold otherwise is to compel the presentation of frivolous issues, the forwarding of which distorts the nature and ends of law, debases the legal profession, disregards the integrity of the judicial

process, and alienates our citizenry, all without benefiting the immediate object of our attention -- the indigent Defendant seeking post-conviction relief.

Therefore, since it is clear that the instant Petition forwards no grounds upon which post-conviction relief can be granted, it is hereby dismissed after the appointment of counsel and without a hearing.

Accordingly, and in light of the foregoing, we enter the following

O R D E R

AND NOW, TO WIT, this 7th day of October, 1982, Defendant's Petition for Relief under the Post Conviction Hearing Act is hereby denied after the appointment of counsel and without a hearing.

BY THE COURT:

/s/
Blake, J.

EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

(8)

Y.K.

ORIGINAL

NO. 85-2099

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1986

COMMONWEALTH OF PENNSYLVANIA,
Petitioner

v.

DOROTHY FINLEY,
Respondent

RESPONDENT'S REPLY BRIEF TO THE PETITION FOR WRIT OF CERTIORARI TO THE SUPERIOR COURT OF PENNSYLVANIA

CATHERINE M. HARPER
(Counsel of Record)

Hamburg, Rubin, Mullin
& Maxwell
800 East Main Street
Lansdale, PA 19446

TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES
(Continued)

NO. 85-2099

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1986

COMMONWEALTH OF PENNSYLVANIA,
Petitioner

v.

DOROTHY FINLEY,
Respondent

RESPONDENT'S REPLY BRIEF TO THE PETITION FOR WRIT OF CERTIORARI TO THE SUPERIOR COURT OF PENNSYLVANIA

Respondent, Dorothy Finley, by her court-appointed counsel, Catherine M. Harper, Esquire, of the law firm of Hamburg, Rubin, Mullin and Maxwell, respectfully submits this Reply Brief in accordance with Rule 22 of the United States Supreme Court Rules, in response to the Petition for Writ of Certiorari sought by the Commonwealth of Pennsylvania at the above-captioned court term and number.

Your Respondent respectfully urges this Court to refuse the Writ of Certiorari because the Pennsylvania courts have

correctly held that where counsel is court-appointed for an indigent criminal defendant, pursuant to the mandates of the applicable state statutes and criminal rules, and that counsel thereafter seeks to withdraw from representing the indigent criminal defendant, counsel must follow the procedures outlined in Anders v. California, 386 U.S. 738, 18 L. Ed. 2d 493, 87 S. Ct. 1396 (1967) Rehearing Denied, 388 U.S. 924, 18 L. Ed. 2d 1377, 87 S. Ct. 2094, and further, that the Pennsylvania courts correctly determined that the procedure suggested as an alternative by the Philadelphia Court of Common Pleas, in requiring the court-appointed counsel to brief the case against his client, not only fails to comport with Anders v. California, but, more importantly, offends traditional notions of due process and equal protection before the Law.

COUNTERSTATEMENT OF THE CASE

This matter comes before the Court on a Petition for Writ of Certiorari by the Commonwealth of Pennsylvania, after the Pennsylvania Supreme Court, the highest court in the Commonwealth of Pennsylvania, dismissed the Commonwealth's prior appeal as "having been improvidently granted," and reinstated the able and well reasoned Opinion and Order of the Pennsylvania Superior Court. Commonwealth v. Finley, 330 Pa. Super. Ct. 313, 479 A.2d 568 (1984), app. dismd. 507 A.2d 822 (Pa. 1986).

The Pennsylvania Supreme Court's Order was per curiam and was issued after the matter had been fully briefed and argued before the Court on October 23, 1985.

The previous Pennsylvania Superior Court Opinion held that the procedure utilized by counsel in attempting to withdraw from representation of the

indigent criminal defendant had resulted in ineffective assistance of counsel, because instead of following the procedures outlined in Anders v. California, supra, court-appointed counsel had chosen instead to outline for the Court the reasons why a Post-Conviction Hearing Act Petition would be meritless. The Court found this procedure defective and ordered that the case be remanded for subsequent counsel to represent Dorothy Finley in the filing of an Amended Petition under the Post-Conviction Hearing Act (Commonwealth v. Finley, 330 Pa. Super. 313, 479 A.2d 568 (1984)). (Commonwealth Appendix at 2B-19B).

Dorothy Finley's underlying conviction resulted from a non-jury trial on October 17, 1975, when she was convicted of robbery, carrying firearms without a license in a vehicle, possessing instruments of crime generally, and prohibited offensive weapons, criminal conspiracy and

murder in the second degree. On the murder charge, she was sentenced to life imprisonment; various sentences were meted out with respect to the other charges. She has been incarcerated at the State Correctional Institution for Women at Muncy in Pennsylvania, since 1975.

Mrs. Finley was represented at trial by a court-appointed attorney who also took the direct Appeal from her convictions to the Pennsylvania Supreme Court, where all of the sentences and convictions were affirmed in a per curiam opinion approximately one page in length at Commonwealth of Pennsylvania v. Dorothy Finley, 477 Pa. 211, 383 A.2d 898 (1978).

According to the Opinion, two issues only had been raised on Mrs. Finley's behalf: (1) there was allegedly insufficient evidence to support any of the convictions for the crimes charged, and (2) a search warrant was based on illegally obtained evidence and therefore, the

evidence obtained pursuant to that warrant was inadmissible. Having identified those issues, the Supreme Court concluded: "Having found no merit in either of these arguments, we affirm the judgments of sentence." Thereafter, Mrs. Finley filed a pro se Petition for Relief under the Pennsylvania Post-Conviction Hearing Act, 42 Pa. C.S.A. § 9541 et seq. [Previously 19 P.S. 1180-1 et seq.] Her uncounseled Petition merely repeated the allegations raised by her trial counsel in a direct appeal to the Supreme Court. Nevertheless, although Mrs. Finley averred that she was indigent and requested the appointment of counsel, the PCHA Petition was denied by the Court without a hearing and without the appointment of counsel. The Court found that: "The allegations raised in the instant petition must be deemed to have been fully litigated." Later, the Pennsylvania Supreme Court reversed that determination, vacated the Order denying

relief, and remanded the case to the PCHA court with instructions that counsel be appointed for Mrs. Finley. Commonwealth v. Dorothy Finley, 497 Pa. 332, 440 A.2d 1183 (1981), reargument denied. The Pennsylvania Supreme Court determined: "An indigent petitioner has the right to assistance of counsel with his first PCHA petition." The ruling rests on both the Post-Conviction Hearing Act, and the Pennsylvania Rules of Criminal Procedure. The Pennsylvania Supreme Court sagely noted that: "Counsel for a PCHA [Post-Conviction Hearing Act] petitioner can more ably explore legal grounds for complaint, investigate underlying facts, articulate claims for relief, and promote efficient administration of justice." Commonwealth v. Finley, Id. at 335.

Thereafter, in compliance with the Order of the Pennsylvania Supreme Court, counsel was appointed for Mrs. Finley on her PCHA Petition. However, that court-

appointed attorney did not fulfill the role envisioned for him by the Pennsylvania Supreme Court in remanding the case. The attorney did not file an Amended PCHA Petition, and he did not file a Brief in support of the issues raised in the uncounseled PCHA Petition, or on any other issues. Instead, Mrs. Finley's court-appointed counsel "concluded that no arguably meritorious issues existed" and "sought advice from [the PCHA] court". (See the Opinion and Order of the Honorable Edward J. Blake, dated February 22, 1983, found at page 1C of the Commonwealth's appendix).

The PCHA Court thereafter instructed court-appointed counsel that he might withdraw his appearance if he followed the following procedure, ultimately found defective by the Pennsylvania Superior Court:

> Counsel was instructed that where he had completed a comprehensive review of the entire record and the applicable law, and has

> interviewed the defendant and concluded that the record was devoid of arguably meritorious contentions, counsel should write this court in letter form detailing not only the nature and extent of his review, but also listing each issue the defendant herself wished to have raised, followed by an explanation why those issues were meritless. At that point, this Court would conduct its own independent review and, if our conclusions coincide with counsel's, the Petition would be dismissed without a hearing and defendant would be apprised of her appellate rights.

Blake Opinion at Commonwealth Appendix 8C.

PCHA counsel followed the procedure suggested to him by the Court, instead of the procedure outlined in Anders v. California, supra, and wrote a letter to the Court "explaining" why Mrs. Finley's PCHA Petition would be "meritless". Not surprisingly, the PCHA Court dismissed her Petition without a hearing and he was relieved of his appointment. Counsel never wrote a Brief setting forth issues of arguable merit, and, apparently, never notified the indigent criminal defendant of

his intentions or of her rights to proceed pro se or to obtain new counsel. After the Court dismissed the Petition without a hearing, undersigned counsel was appointed to pursue an appeal to the Pennsylvania Superior Court.

Pennsylvania Superior Court concluded that the procedure suggested by the PCHA Court, and followed by the PCHA court-appointed attorney, was defective because it had the effect of depriving Mrs. Finley of her right to adequate representation on her PCHA Petition. (See Pennsylvania Superior Court Opinion reproduced at Commonwealth's Appendix at 2B et seq., 19B).

The Pennsylvania Superior Court issued its Opinion at Commonwealth v. Dorothy Finley, 330 Pa. Super. 313, 479 A.2d 568 (1984) (reproduced in the Commonwealth's Appendix at 2B-19B).

The Opinion of the Pennsylvania Superior Court first notes that the

requirements outlined by this Court in Anders v. California, supra, are applicable to the instant case where counsel appointed to represent an indigent defendant in a collateral review proceeding wishes to withdraw from the case on the ground that an appeal would be frivolous. The Court also traced the history of the progeny of Anders v. California in the Pennsylvania courts, and noted that Anders has been applied to direct appeal requirements, and thereafter concluded that it should also apply to indigent criminal defendant's first appeal under the Post-Conviction Hearing Act, a collateral review statute. Key to the Superior Court's reasoning in this case was the prior decision by the Pennsylvania Supreme Court that Dorothy Finley was entitled to court-appointed counsel on her first Post-Conviction Hearing Act Petition. The Superior Court astutely noted: "The Supreme Court wished to afford appellant the opportunity to

amass other issues with arguable merit. . . Moreover, Pennsylvania Rule of Criminal Procedure 1504, in affording counsel, means that counsel should act as an advocate in fulfilling his role." (Pennsylvania Superior Court Opinion reproduced in the Commonwealth's Appendix at 13B.) The Court declined to make its own exhaustive search of the record without benefit of an advocate's brief, because the Supreme Court had mandated that counsel be appointed to assist Dorothy Finley in her PCHA Petition. "This remand carries with it a strengthening obligation to assess the quality of appellant's case in an arena wherein she is accompanied by a zealous advocate." (Pennsylvania Superior Court Opinion at 16B.)

Therefore, the Court concluded that the procedure followed by PCHA counsel was defective in that counsel's chosen course of a "no merit letter" was insufficient in light of the fact that there appeared, to

the Pennsylvania Superior Court, to be arguably meritorious issues, and the court-appointed counsel's review of the record was not evident. The Court also noted that court-appointed counsel had failed to comply with the Anders requirement that the indigent herself be informed of counsel's decision, and that she be given the opportunity to proceed pro se. For those reasons, the Pennsylvania Superior Court endorsed the view that counsel seeking to withdraw from a court appointment represent an indigent criminal defendant on a Post-Conviction Hearing Act Petition must comply with the requirements of Anders v. California, that were restated by the Court as follows:

> If the attorney, after a conscientious evaluation of the record, finds his case to be 'wholly frivolous', he may so advise the court and request permission to withdraw. He must, however, accompany his request with a brief referring to anything in the record which will 'arguably' support an appeal. A copy of that brief should then be furnished to the indigent within

> enough time to allow the latter to pursue an appeal, either counseled or pro se. The court (emphasis in original) after a full examination of the record then decides whether the case is wholly frivolous; and if it so finds, it may grant counsel's request to withdraw.

(Pennsylvania Superior Court Opinion at 7B-8B).

Thus, the Pennsylvania Superior Court remanded the case to the Court of Common Pleas for Philadelphia County with the directive that Finley be permitted to file a counseled amended PCHA Petition.

Thereafter, the Commonwealth sought review of the Superior Court decision in the Pennsylvania Supreme Court by allocatur. Allocatur was granted, and the matter was briefed and argued before the Pennsylvania Supreme Court. On April 23, 1986, in a Per Curiam Opinion, the Pennsylvania Supreme Court simply ordered that the Appeal be dismissed "as having been improvidently granted." (Appendix at 1A-2A), but the Commonwealth once again

declined to follow the directive of the Superior Court and now seeks review by this Court of the Superior Court's Order applying the requirements of Anders v. California to counsel who seeks to withdraw from representation of an indigent criminal defendant on her first Post-Conviction Hearing Act Petition.

ARGUMENT

A. THE COMMONWEALTH'S PETITION IS WITHOUT MERIT BECAUSE THE PENNSYLVANIA COURTS CORRECTLY DETERMINED THAT COURT-APPOINTED COUNSEL MUST FOLLOW THE DICTATES OF ANDERS V. CALIFORNIA, 386 U.S. 738 (1967) IN SEEKING TO WITHDRAW FROM THE REPRESENTATION OF AN INDIGENT IN HER FIRST PETITION UNDER THE PENNSYLVANIA POST-CONVICTION HEARING ACT WHERE STATE LAW REQUIRES COUNSEL BE PROVIDED.

The Commonwealth of Pennsylvania provides criminal defendants with a right of collateral review under the Post-Conviction Hearing Act, 42 Pa. C.S.A. § 9541 et seq., Public Law, 417, May 13, 1982 (hereinafter "PCHA"). Indigent petitioners under the Post-Conviction Hearing Act, are entitled to the appointment of counsel on their first PCHA petition under § 9551 of the Act.[1] The

[1] 42 Pa. C.S.A. § 9551(b) Appointment of Counsel: "If the petitioner is without counsel and alleges he is without means to procure counsel, he shall state whether or not he wishes counsel to be appointed to represent him. If appointment of counsel is so requested and the court is of the opinion that a hearing on the petition is required, the court shall appoint counsel if satisfied that the petitioner has no means to procure counsel. The appointment

Pennsylvania Rules of Criminal Procedure similarly provide for the appointment of counsel for PCHA petitions under Pennsylvania Rule of Criminal Procedure 1503(a).[2]

The Pennsylvania courts have interpreted the Post-Conviction Hearing Act (and its predecessor now repealed and once found at 19 Purdons Statute § 1180-1, Public Law 1580, January 25, 1966) as

of counsel shall not be required if petitioner's claim is patently frivolous and without trace of support in the record as provided by § 9549 (relating to hearing on petition)."

[2] Rule 1503(a): "Except as provided in Rule 1504, when an unrepresented petitioner satisfies the court that he is unable to procure counsel, the court shall appoint counsel to represent him. The court, on its own motion, shall appoint counsel to represent a petitioner whenever the interests of justice require it." Rule 1504 provides that the appointment of counsel is not necessary "when a previous petition involving the same issue or issues has been finally determined adversely to the petitioner and he was either afforded the opportunity to have counsel appointed or was represented by counsel in proceedings thereon."

requiring counsel on a first PCHA petition. Commonwealth v. McClinton, 488 Pa. 598, 413 A.2d 386 (1980). The requirement that counsel be appointed to represent the indigent on his first PCHA petition is applied even where the petition (generally drawn pro se) fails to raise new issues, because "counsel for PCHA petitioner can more ably explore legal grounds for a complaint, investigate underlying facts, articulate claims for relief and promote efficient administration of justice." Commonwealth v. Finley, 497 Pa. 332, 440 A.2d 1183 (1981). See also Commonwealth v. McClinton, supra, and cases cited therein.[3]

Pennsylvania's requirement that counsel be appointed on a first PCHA petition is, of course, a requirement that

[3] Commonwealth v. Blair, 460 Pa. 31, 331 A.2d 213 (1975); Commonwealth v. Mitchell, 427 Pa. 395, 235 A.2d 148 (1967); Commonwealth v. Richardson, 426 Pa. 419, 233 A.2d 183 (1967); Commonwealth v. Hoffman, 426 Pa. 226, 232 A.2d 623 (1967); and Commonwealth v. Fiero, 462 Pa. 409, 341 A.2d 448 (1975).

counsel so appointed shall have the opportunity to and shall, in fact, adequately discharge the responsibilities required by his representation. Commonwealth v. Ollie, 304 Pa. Super. 505, 450 A.2d 1026 (1982). Therefore, where counsel fails to file an amended PCHA petition (the first having been filed pro se), fails to file a brief, fails to seek an extension of time, and fails to seek a hearing, courts have held that the petition was in actuality "uncounseled," and have determined that new counsel should be afforded the petitioner. Commonwealth v. Ollie, supra, at 510.

Since an indigent's right to counsel on her first PCHA petition is a right afforded by the Pennsylvania courts under Pennsylvania statutes, and Pennsylvania Rules of Criminal Procedure, it is reasonable for the courts of the Commonwealth to determine that counsel seeking to withdraw from representation in

such a case must follow the dictates of Anders v. California, 386 U.S. 738 (1967), even if the requirement to counsel in this instance were ultimately found not to be required by the United States Constitution.

Moreover, once counsel has been appointed, there is no logical reason to distinguish between the proper procedures to be followed when counsel seeks to withdraw from representation in a direct appeal case, and when counsel seeks to withdraw from representation in a collateral review case. If a petitioner has the right to counsel at all, that right must carry with it the right to effective counsel, and following proper procedures in order to withdraw is an essential component of effective representation. Anders v. California, supra, has been the rule in Pennsylvania for counsel seeking to withdraw from the representation of an indigent since Commonwealth v. Baker, 429 Pa. 209, 239 A.2d 201 (1968). The court

wholeheartedly adopted the procedure set out in Anders v. California, noting:

> The Supreme Court of the United States has recognized in Anders that even the most diligent court-appointed counsel may sometimes justifiably believe that he is being asked to pursue an appeal totally devoid of merit. However, because it is also fundamental to the notion of equal justice for all that the indigent defendant receive just as spirited a defense as the man that can retain private counsel, the Supreme Court has set forth very strict standards, now applicable to the states, which counsel and the appellate court must follow before an attorney may be permitted to withdraw his services. Id. at 211.

Sound jurisprudence requires that once a right to counsel is recognized, that the case of Anders v. California provides the only acceptable method by which counsel might withdraw from his representation of the indigent. This Court has so decided, and the Pennsylvania courts were wholly correct in determining that the requirements of Anders v. California must be applied to the situation in the case at bar, where a court-appointed attorney seeks

to withdraw from representation of an indigent on a petition for review under the Pennsylvania Post-Conviction Hearing Act, once counsel has been deemed a necessity by the Pennsylvania courts.

B. THE COMMONWEALTH'S PETITION FOR A WRIT OF CERTIORARI SHOULD BE DENIED BECAUSE THE PENNSYLVANIA COURTS CORRECTLY DETERMINED THAT THE PROCEDURE FOLLOWED IN THE CASE AT BAR BY COURT-APPOINTED COUNSEL SEEKING TO WITHDRAW FROM REPRESENTING AN INDIGENT, WAS DEFECTIVE AND OFFENDS TRADITIONAL NOTIONS OF DUE PROCESS AND EQUAL PROTECTION.

As the above concludes, the Pennsylvania courts correctly determined that the requirements of Anders v. California should be followed by a court-appointed attorney who seeks leave to withdraw from representing an indigent on her petition for review under the Post-Conviction Hearing Act. In the instant matter, not only did the attorney fail to follow the dictates of Anders v. California, he unfortunately transgressed notions of due process and equal protection

of the laws and fairness to indigent criminal defendants in following the route suggested by the Honorable Edward J. Blake of the Court of Common Pleas of Philadelphia, sitting as Post-Conviction Hearing Act Judge. The procedure suggested by the PCHA court in the instant matter, is outlined above at page 8. Briefly, it was found defective under the requirements of Anders v. California, supra, by the Pennsylvania Superior Court, because court-appointed counsel simply failed to comply with the requirements of Anders in that he (1) failed to file a petition for leave to withdraw stating that he has found the appeal to be frivolous; (2) failed to file a proper Anders brief referring to anything in the record that might arguably support the appeal, and instead, briefed the case against his client with a "no merit letter," and failed to furnish the indigent herself with a copy of an Anders brief and withdrawal petition to give the indigent a

chance to retain new counsel or raise issues on her own behalf before the court.

Under the circumstances, the Pennsylvania Superior Court felt that Dorothy Finley had been denied effective assistance of counsel in connection with the litigation of her petition under the Post-Conviction Hearing Act, and remanded the case for an evidentiary hearing on the claims raised in appellate counsel's brief, and "any other issues discerned by counsel after an exhaustive search of the record in accordance with his opinion."

The procedure followed in the case at bar was defective not only because it failed to live up to the requirements of Anders v. California, supra, but also because it affirmatively required court-appointed counsel to brief the case against his client, and forced the court to determine the merits of the petition without benefit of an advocate's brief or an advocate's review of the record in

determining the issues. The procedure followed by the Philadelphia PCHA court in this case ill serves the indigent criminal defendant, and ill serves the efficient administration of justice.

The procedure followed in the case at bar, like that followed in Anders v. California, supra, forces the court to make an independent review of the record, without the assistance of an advocate's brief or an advocate's review of the record or an advocate's marshalling of the facts, and nevertheless to pass judgment on the merits. As this court correctly noted in Anders v. California, supra:

> The constitutional requirement of substantial equality and fair process can only be attained where counsel acts in the role of an active advocate on behalf of his client, as opposed to that of amicus curiae. The no merit letter and the procedure it triggers do not reach that dignity. Counsel should, and can with honor and without conflict, be of more assistance to his client and to the court. His role as advocate requires that he support his client's appeal to

the best of his ability. Id. at 744.

Although the Anders case applied to a counseled direct appeal, there is simply no reason to eschew it in a collateral review proceeding, where the Pennsylvania courts have determined that the petitioner is entitled to the assistance of counsel. The reasons for requiring an exhaustive review of the record, an Anders brief, and a separate petition to withdraw, with notice to the indigent, are no less compelling in the Post-Conviction Hearing Act process than they are in a direct appeal.

Thus, where a state grants to a criminal defendant the right to effective representation on his first petition under a state statutory collateral review scheme, and the petitioner is thereafter denied the effective representation of counsel (as Dorothy Finley was in this case), the result is constitutionally infirm. See, Evitts v. Lucey, 83 L. Ed. 2d 821, 53 U.S.

L.W. 4101, 105 S. Ct. 830 (1985). See also Ross v. Moffitt, 417 U.S. 600 (1974): "we do not mean by this opinion to in any way discourage those states which have, as a matter of legislative choice, made counsel available to convicted defendants at stages of judicial review. . . Our reading of the Fourteenth Amendment leaves these choices to the State. . . " Id. at 618-619.

The exploration of the legal grounds for the petition, investigation of the underlying facts, and formulation of an articulate statement of the claims are functions of an advocate, and would be inappropriate for the judge or his staff. The procedure followed in the case at bar is defective since it lacks the requirements found necessary in Anders v. California, supra, and because it required counsel to affirmatively brief the case against his client, and therefore neither promotes the efficient administration of justice, nor secures to the indigent her

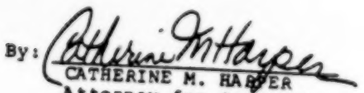
rights under the due process and equal protection clauses of the Constitution of the United States of America.

CONCLUSION

For the above-stated reasons, it is respectfully submitted that the Petition for Writ of Certiorari be denied and the case remanded in accordance with the Opinion and Order of the Pennsylvania Superior Court.

Respectfully submitted,

HAMBURG, RUBIN, MULLIN & MAXWELL

By: 
CATHERINE M. HARPER
Attorney for Respondent

No. 85-2099

In The

Supreme Court of the United States

October Term, 1986

—o—

COMMONWEALTH OF PENNSYLVANIA,
Petitioner,

v.

DOROTHY FINLEY,
Respondent.

—o—

ON WRIT OF CERTIORARI TO THE SUPERIOR COURT OF PENNSYLVANIA

—o—

JOINT APPENDIX

—o—

GAELE McLAUGHLIN BARTHOLD*
Deputy District Attorney
ANN C. LEBOWITZ
Assistant District Attorney
LAURIE MAGID
Assistant District Attorney
HUGH J. BURNS, JR.
Assistant District Attorney
RONALD EISENBERG
Chief, Appeals Unit
WILLIAM G. CHADWICK, JR.
First Assistant District Attorney
RONALD D. CASTILLE
District Attorney
Office of the District Attorney
1300 Chestnut Street
Philadelphia, PA 19107
Telephone: (215) 875-6010

(Counsel for Petitioner)

CATHERINE M. HARPER*
Hamburg, Rubin, Mullin and Maxwell
800 East Main Street
Lansdale, PA 19446
Telephone: (215) 368-3600

(Counsel for Respondent)

*Counsel of Record

PETITION FOR CERTIORARI FILED JUNE 20, 1986
CERTIORARI GRANTED OCTOBER 6, 1986

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
or call collect (402) 342-2831

TABLE OF CONTENTS

COURT OF COMMON PLEAS OF PHILADELPHIA

TRIAL DIVISION—CRIMINAL SECTION

DOCKET ENTRIES

Edward J. Bradley
President Judge

COMMONWEALTH
VS.
DOROTHY FINLEY

1975 May

1128—Robbery
1129—Carrying Firearms on Public Streets of [sic] Public Property, Unlawfully Carrying Firearm without a License, Carrying Firearms without a license in a vehicle
1130—Possessing Instruments of Crime, Generally, Possessing Instruments of Crime, Concealed Weapon, Prohibited Offensive Weapons
1131—Criminal Conspiracy
1132—Murder, Voluntary Manslaughter, Involuntary Manslaughter

---

Sept. 12, 1975—Motion to Suppress Statements and Physical Evidence, begun

Sept. 19, 1975—Court Room 676
Motion to Suppress completed and held under advisement. Counsel to submit briefs. Prattis, J.

Oct. 14, 1975—Court Room 253
Presiding Honorable Armand Della Porta
Defendant present with her counsel

—Upon being arraigned, pleads Not Guilty
—Jury trial is waived

—Defense Demurs to the evidence
—Demurrer over-ruled

Oct. 17, 1975—Court Room 253
ADJUDGED:
1128—Guilty
1129—Guilty of Carrying Firearms without a license in a vehicle. Not Guilty as to 1st and 2nd counts.

Oct. 17, 1975—1130—Guilty first and third count.
Not Guilty second count.
1131—Guilty
1132—Guilty, Murder, 2nd degree
—Sentence deferred.
—Bail increased from five thousand dollars ($5,000.) to Ten thousand dollars ($10,000.) Defendant committed pending posting of additional $5,000.00 bail.
—Presentence investigation and psychiatric examination ordered. Della Porta, J.

Feb. 24, 1976—Court Room 436
Post Trial Motions are *denied.*
And Now Sentence:
1128—Not less than ten (10) years nor more than twenty (20) years in State Correctional Institution, to run concurrent with sentence imposed on Bill 1132.
Della Porta, J.

1129—Sentence Suspended.
Della Porta, J.

1130—Not less than one (1) year nor more than two (2) years at State Correctional Institution, to run consecutive to sentence on #1131 and concurrent with sentence on #1132. Della Porta, J.

1131—Not less than five (5) years nor more than ten (10) years at State Correctional Institution, to run consecutive to sentence on #1128 and concurrent with sentence on #1132. Della Porta, J.

1132—Life imprisonment at State Correctional Institution. Defendant to remain at House of Correction until state of defendant's husband is determined within thirty days. Della Porta, J.

Mar. 23, 1978—Judgment of sentence imposed on Feb. 24, 1976 is affirmed by the Supreme Court of Penna.

Sept. 21, 1978—Petition for Allowance of Compensation and Expenses, filed

Oct. 4, 1978—Order of Judge Rosenberg, allowing compensation to David Zwantez, Esq. in the amount of $3,400. and $173.80 for expenses.

April 9, 1979—Petition for Relief Under Post Conviction Hearing Act, filed

Sept. 28, 1979—Memorandum Opinion and Order of Judge Blake wherein defendant's Petition for Relief under the Post Conviction Hearing Act is *denied.*

Oct. 19, 1979—Notice of Appeal to Superior Court, filed (2160 Oct. 1979)

12-24-1981—Order of the Court below is vacated and the Matter is remanded to that court with instructions to determine whether appellant was indigent and if so to appoint counsel. Flaherty, J.

1-29-1982—Petition for reargument, denied.

4-15-1982—Record returned to the Lower Court.

June 22, 1982—Michael Seidman, Esq. appointed

Oct. 7, 1982—Order of Judge Blake filed wherein pursuant to the remand, an attorney was appointed for the petitioner. After full investigation, the appointed attorney has

concluded that there are no issues of arguable merit. Accordingly, the Petition for Relief under the Post Conviction Hearing Act, filed in the above captioned matter, is hereby dismissed without hearing. Blake, J.

Oct. 18, 1982—Notice of Appeal to Superior Court filed at #2978 Phila. 1982

Oct. 25, 1982—Order of Judge Blake relieving Michael Seidman and ordered the appointment of new counsel.

Oct. 26, 1982—Seidman, Esq. relieved. Catherine Harper, Esq. appointed.

THIS IS TO CERTIFY THAT THE ABOVE IS A TRUE AND CORRECT COPY OF THE DOCKET ENTRIES.

Feb. 22, 1983—Opinion filed. Blake, J.
/s/ Mary Heying

LIST OF DOCUMENTS IN FILE

1. Microfilmed Bills of Indictment #1128-1132 May 1975
2. Petition for Allowance of Compensation and Expenses
3. Order of Judge Rosenberg
4. Petition for Relief under Post Conviction Hearing Act
5. Memorandum Opinion and Order of Judge Blake
6. Notice of Appeal to Superior Court (2160 Oct. 1979)
7. Notes of Testimony:
   5-7-75, 9-18-75, 9-19-75, 10-14-75, 10-15-75, (10-16 & 17-75)

DISPOSITION

July 26, 1984—Superior Court of Pennsylvania remands for an evidentiary hearing on the claims raised in Appellant's brief and any other issues discerned by counsel after an exhaustive search of the record in accordance with the Opinion of Judge Popovich. Jurisdiction Relinquished.

June 13, 1986—Supreme Court appeal dismissed as improvidently granted.

June 20, 1986—Record to Ray Porreca, Esq. P.C.H.A. legal counsel.

[J-332-81]

IN THE SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

COMMONWEALTH OF PENNSYLVANIA	No. 80-3-547
v.	Appeal from the P.C.H.A. Order of the Philadelphia Court of Common Pleas, Trial Division, Blake, J., as of May Term, 1975, Nos. 1128, 1129, 1130, 1131, and 1132, entered September 28, 1979 denying Defendant's Petition for Relief under the Post Conviction Hearing Act.
DOROTHY FINLEY, Appellant	

SUBMITTED:
OCTOBER 19, 1981

OPINION OF THE COURT

MR. JUSTICE FLAHERTY 12-24-81

Appellant Dorothy Finley was convicted of possessing an instrument of crime generally, prohibited offensive weapon, carrying a firearm without a license, criminal conspiracy, robbery and murder of the second degree. On direct appeal, two issues were raised: (1) the evidence was insufficient to sustain the convictions and (2) evidence obtained pursuant to a search warrant was inadmissible because the search warrant was based on illegally obtained evidence. In a *per curiam* opinion, this

Court affirmed the judgments of sentence. *Commonwealth v. Finley,* 477 Pa. 211, 383 A.2d 898 (1978). Appellant subsequently filed a *pro se* petition pursuant to the Post Conviction Hearing Act, Act of January 25, 1966, P.L. 1580 (1965), 19 P.S. § 1180-1 et seq. (Supp. 1981-82), where she raised the identical issues addressed by this Court on direct appeal. Although appellant alleged she was indigent and requested appointment of counsel, the PCHA court denied her petition without a hearing, holding the issues raised in the petition had been finally litigated. 19 P.S. § 1180-4. On appeal from the denial of her petition appellant requests the case be remanded to the lower court for appointment of counsel to assist in the preparation and filing of an amended petition under the Act.

An indigent petitioner has the right to the assistance of counsel with his first PCHA petition. *Commonwealth v. McClinton,* 488 Pa. 598, 413 A.2d 386 (1980). The Commonwealth urges us to deny appellant relief, arguing this case falls within an exception to the right to counsel provided in Pa.R.Crim.P. 1504. Pa.R.Crim.P. 1503(a) requires the court to appoint counsel once petitioner satisfies the court of his financial inability to obtain counsel.[1] The only exception to this rule as provided in Pa.R.Crim.P. 1504 is as follows:

---

[1]Although Section 12 of the Act, 19 P.S. § 1180-12, provides appointment of counsel is not required where the petitioner's claim is "patently frivolous and without trace of support in the record. . .", this provision has been suspended in part and superseded insofar as it is inconsistent with Pa.R.Crim.P. 1503(a) and 1504. Pa.R.Crim.P. 1507; *Commonwealth v. Blair,* 470 Pa. 598, 369 A.2d 1153 (1977).

> Appointment of counsel shall not be necessary and petitions may be disposed of summarily when a previous *petition* involving the same issue or issues has been finally determined adversely to the petitioner and he either was afforded the opportunity to have counsel appointed or was represented by counsel in proceedings thereon.

(Emphasis supplied). Our prior case law has consistently adopted a strict construction of the language of the Rule. *Commonwealth v. Blair*, 470 Pa. 598, 369 A.2d 1153 (1977); *Cf. Commonwealth v. Sangricco*, 490 Pa. 126, 415 A.2d 65 (1980). Rule 1504 provides an exception to the general right to appointment of counsel only where a previous *PCHA petition* involving the same issues has been determined adversely to the petitioner in a *proceeding on the PCHA petition* and the petitioner either knowingly waived his right to representation by counsel or was actually represented by counsel in that proceeding. Since Rule 1504 applies to proceedings on prior PCHA petitions, it is not dispositive of appellant's claim instantly.

Counsel for a PCHA petitioner can more ably explore legal grounds for complaint, investigate underlying facts, articulate claims for relief and promote efficient administration of justice.

Accordingly, the order of the court below is vacated and the matter is remanded to that court with instructions to determine whether appellant was indigent and if so to appoint counsel. If it is determined that appellant is entitled to the appointment of counsel, she may, upon request, amend her petition.

It is so ordered.

MICHAEL A. SEIDMAN
A Professional Corporation
Attorney at Law

SUITE 916
1616 WALNUT STREET
PHILADELPHIA, PA. 19103
(215) 546-8350

October 5, 1982

Honorable Edward J. Blake
658 City Hall
Philadelphia, PA 19107

Re: Commonwealth v. Dorothy Finley
May Term, 1975
No. 1128-1132

Dear Judge Blake:

I have reviewed the Notes of Testimony in the above matter and I have met with the defendant to discuss her Post Conviction Hearing Act Petition. I cannot find any issues to raise on her behalf that are of arguable merit. In addition, my client, Mrs. Finley, did not find any issues that she wished to raise other than the issues raised in her pro se petition. One of these issues deals with the sufficiency of the evidence. The Commonwealth's evidence consisted primarily of eyewitness testimony. The sufficiency of that testimony was a matter of credibility which was decided against the defendant by the waiver Judge. The other issue involved the search warrant which was finally litigated on direct appeal to our Supreme Court. See 383 A.2d 898 (1978). Consequently, I respectfully request to be relieved of my appointment in this matter.

Very truly yours,

/s/ Michael A. Seidman

MAS:jl
cc: Dorothy Finley

IN THE COURT OF COMMON PLEAS
OF PHILADELPHIA COUNTY

TRIAL DIVISION—CRIMINAL SECTION

COMMONWEALTH OF PENNSYLVANIA	MAY TERM, 1975
vs.	
DOROTHY FINLEY	NOS. 1128-1132

OPINION AND ORDER

BLAKE, J. FILED: February 22, 1983

This matter is before the Court on Defendant's Petition for Relief under the Post Conviction Hearing Act. 42 Pa.C.S.A. 9541 et seq. Following careful review of the entire record and of the applicable law, we are convinced that this Petition must be dismissed after the appointment of counsel and without a hearing.

Defendant was arrested on April 18, 1975 and charged with robbery, carrying firearms on a public street, unlawfully carrying a firearm without a license, carrying firearms without a license in a vehicle, possessing the instruments of crime generally, possessing a concealed weapon, possessing a prohibited offensive weapon, criminal conspiracy, murder, voluntary and involuntary manslaughter. On October 14, 1975 the Defendant waived her right to trial by jury, immediately proceeded to trial before the Honorable Armand Della Porta and was found guilty of robbery, carrying firearms without a license in a vehicle, possessing the instruments of crime generally, possessing a prohibited offensive weapon, criminal conspiracy, and second degree murder. Timely post-trial motions were heard and denied on February 26, 1976, and the Defendant

was sentenced to concurrent terms of not less than ten (10) nor more than twenty (20) years imprisonment on Bill No. 1128, not less than one (1) nor more than two (2) years imprisonment on Bill 1130, not less than five (5) nor more than ten (10) years imprisonment on Bill No. 1131 and a term of life imprisonment on Bill No. 1132. Sentence was suspended on Bill No. 1129.

Defendant pursued an unsuccessful direct appeal to the Supreme Court of Pennsylvania which, on March 23, 1978, affirmed the judgment of sentence, per curiam. *Commonwealth vs. Finley*, 477 Pa. 211, 383 A.2d 898 (1978).

On April 9, 1979, the Defendant filed, pro se, the instant PCHA Petition for Relief. However, in an Opinion and Order dated September 28, 1979, this Court denied Defendant's Petition without the appointment of counsel and without a hearing, on the ground that the two (2) issues forwarded in the pro se Petition were identical to those raised and denied on direct appeal before the Supreme Court of Pennsylvania, and had therefore been finally litigated under 19 P.S. 1180-4 [now 42 Pa.C.S.A. 9544(A)] of the former PCHA statute.

Defendant pursued a counseled appeal from the denial of PCHA relief to the Superior Court of Pennsylvania which, on May 8, 1980, transferred the appeal to our Supreme Court. On December 24, 1981 our Supreme Court vacated the September 28, 1979 Order of this Court and remanded with " . . . instructions to determine whether appellant was indigent and if so to appoint counsel. If it is determined that appellant is entitled to the appointment of counsel, she may, upon request, amend her petition." *Commonwealth vs. Finley*, 497 Pa. 332, 335,

440 A.2d 1183, 1184-85 (1981). A Commonwealth Petition for Reargument was denied on January 29, 1982.

Consequently, this Court complied with the Supreme Court directive and appointed counsel, Michael A. Seidman, Esquire. Mr. Seidman reviewed the Quarter Sessions file, the notes of testimony, issues of fact and law which Defendant herself had raised, independently reviewed the file and notes for the existence of any additional issues of fact or law which could arguably entitle Defendant to post-conviction relief, and met with Defendant Finley. Upon concluding that absolutely no issues of arguable merit could be found, Mr. Seidman looked to this Court for guidance regarding his duties in this situation.

It had previously been clear that the two issues that Defendant presented in her pro se Petition had been finally litigated to her detriment on direct appeal and, therefore, could not be resurrected in a post-conviction proceeding. 42 Pa.C.S.A. 9544(A)(3).

It is axiomatic that in post-conviction proceedings, counsel cannot be found incompetent or ineffective for failing to raise meritless claims. *Commonwealth vs. Johnson*, 490 Pa. 312, 416 A.2d 485 (1980); *Commonwealth vs. Hubbard*, 472 Pa. 259, 372 A.2d 687 (1977). Counsel's responsible refusal to forward meritless claims preserves the just policy of hearing cases and controversies expeditiously.

A PCHA Court may not only dismiss without a hearing contentions finally litigated [42 Pa.C.S.A. 9544(a)], or waived [42 Pa.C.S.A. 9544(B)], but may also deny and dismiss without a hearing contentions which are " 'patently frivolous' and [are] without a trace of support either in the record or from other evidence submitted by the Petitioner." [42 Pa.C.S.A. 9549(B)]. Therefore, it is clear that no PCHA Petitioner, first-time or otherwise, may assert an absolute entitlement to an evidentiary hearing. *Commonwealth vs. Hayden*, 224 Pa. Super. 354, 356, 307 A.2d 389, 390 (1973).

Instantly, the facts are as follows. Following the above-mentioned remand by our Supreme Court, court-appointed counsel Seidman reviewed the notes of testimony, Quarter Sessions file, issues of fact and law forwarded by Defendant herself, spoke with Defendant, conducted his own review for contentions which only a trained legal mind would discover, and concluded that no arguably meritorious issues existed. He then sought advice from this Court.

Counsel was instructed that he must take his client as he finds her; that the mere fact of having been appointed to represent a pro se Petitioner could not guarantee the existence of arguable contentions which might entitle the Defendant to post-conviction relief; that acceptance of the responsibility of a court-appointment in no way requires that he "find" an issue (e.g., manufacture an issue or present an issue not arguably meritorious); and that he must proceed as a responsible advocate and exercise his best professional judgment.

Counsel was instructed that where he had completed a comprehensive review of the entire record and the applicable law, and had interviewed Defendant and concluded that the record was devoid of arguably meritorious contentions, counsel should write this Court in letter form detailing not only the nature and extent of his review,

but also listing each issue Defendant herself wished to have raised, followed by an explanation why those issues were meritless. At that point, this Court would conduct its own independent review and, if our conclusions coincided with counsel's, the Petition would be dismissed without a hearing and Defendant would be apprised of her appellate rights.

Here, this procedure was followed and the Petition was dismissed without a hearing. Counsel was relieved with new counsel appointed to prosecute the instant appeal.

In *Commonwealth vs. Lowenberg,* 493 Pa. 232, 425 A.2d 1100 (1981), our equally-divided Supreme Court addressed the issue of the responsibility of court-appointed PCHA counsel upon counsel's determination that no arguably meritorious issues existed. Although the Court's numerous Opinions in *Lowenberg's* case are without binding precedential value, we find persuasive the statement of Mr. Justice Nix that the landmark case of *Anders vs. California,* 386 U.S. 738, 87 S.Ct. 1396, 18 L.Ed. 2nd 493 (1976), which outlines to court-appointed counsel the manner in which counsel must proceed as an active advocate, rather than as mere amicus curiae, properly applies to first direct appeals, and implicitly not to collateral attacks such as post-conviction proceedings. 493 Pa. at 239, 425 A.2d at 1101. We also find persuasive the statement of Mr. Justice Flaherty that "the Post Conviction Hearing Act was not intended to eliminate the finality of criminal convictions by allowing defendants to invoke an endless series of collateral proceedings." 493 Pa. at 236, 425 A.2d at 1102.

Furthermore, in the precedent case of *Commonwealth vs. McClendon,* 495 Pa. 467, 434 A.2d 1185 (1981), our

Supreme Court addressed the issue of what an attorney representing an indigent on direct appeal must do, when the attorney concludes that no arguably meritorious issues exist and then requests permission to withdraw as counsel. The Court was logically and constitutionally compelled to define the roles of the appellate court and of counsel consistent with the holding of *Anders vs. California,* supra.

The *McClendon* Court recognized the distinction between issues arguably meritorious yet unlikely to succeed, and issues totally lacking in arguable merit. 495 Pa. at 472-473, 434 A.2d at 1187. The Court concluded that " . . . *Anders* does not require that counsel be forced to pursue a wholly frivolous appeal just because his client is indigent" and that "once we are satisfied with the accuracy of counsel's assessment of the appeal as being wholly frivolous, counsel has finally discharged his responsibility." 495 Pa. at 473, 343 A.2d at 1188.

We agree with the Court's further conclusion that "[T]he role of an advocate, insisted upon in *Anders,* refers to the manner in which the record was examined in an effort to uncover grounds to support the appeal." 495 Pa. at 473, 343 A.2d at 1188.

With *McClendon,* supra, in mind, this Court addressed the issue of what appointed counsel representing an indigent must do in a *collateral* proceeding, where a comprehensive review of the entire record and applicable law, and an interview with Defendant, results in the determination that the PCHA Petition for Relief is devoid of issues of arguable merit. Under the PCHA Statute, this would occur where counsel finds nothing suggesting a conviction attained, or a sentence imposed, without due process of

law (42 Pa.C.S.A. 9542); where neither the Defendant nor the record forwards any contention which, if proven, would establish eligibility for relief (42 Pa.C.S.A. 9543); where all issues have been either finally litigated [42 Pa.C.S.A. 9544(A)]; or waived [42 Pa.C.S.A. 9544(B)]; or where contentions were patently frivolous or fully litigated following an evidentiary hearing at the original trial or at any later proceeding [42 Pa.C.S.A. 9549(B)].

Therefore, following receipt of counsel's letter concluding that arguably meritorious issues were non-existent and listing Defendant's contentions followed by a statement explaining their meritlessness, this Court conducted its independent review, concurred in counsel's conclusions, and dismissed this Petition without a hearing.

We believe that the aforementioned procedure is wholly consistent with safeguarding the rights of Defendant, the purpose and integrity of post-conviction law and proceedings, and the integrity and professionalism of court-appointed counsel. Furthermore, in so writing this Court following the unsuccessful search for arguably meritorious issues, counsel cannot be criticized for proceeding as mere amicus curiae where, until the end of his investigation, counsel vigorously researched the entire record and applicable law as an advocate in Defendant's behalf. To hold otherwise is to compel the presentation of frivolous issues, the forwarding of which distorts the nature and ends of law, debases the legal profession, disregards the integrity of the judicial process, and alienates our citizenry, all without benefiting the immediate object of our attention - - the indigent Defendant seeking post-conviction relief.

Therefore, since it is clear that the instant Petition forwards no grounds upon which post-conviction relief can be granted, it is hereby dismissed after the appointment of counsel and without a hearing.

Accordingly, and in light of the foregoing, we enter the following

O R D E R

AND NOW, TO WIT, this 7th day of October, 1982, Defendant's Petition for Relief under the Post Conviction Hearing Act is hereby denied after the appointment of counsel and without a hearing.

BY THE COURT:

/s/ Blake, J.

J. 17005/84

COMMONWEALTH OF PENNSYLVANIA
v.
DOROTHY FINLEY,
Appellant

IN THE SUPERIOR COURT OF PENNSYLVANIA

No. 02978
Philadelphia 1982

J U D G M E N T

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the above captioned matter, of the Court of Common Pleas of PHILADELPHIA County be, and is REMANDED WITH DIRECTIVES.

By the Court:

/s/ J. Haniel Henry
Prothonotary

Dated: June 22, 1984

J. 17005/84

COMMONWEALTH OF PENNSYLVANIA
v.
DOROTHY FINLEY,
Appellant

IN THE SUPERIOR COURT OF PENNSYLVANIA

No. 02978
Philadelphia 1982

Appeal from the Order of the Court of Common Pleas, Criminal Division, of Philadelphia County at No. 1128-1132 May Term, 1975.

BEFORE: ROWLEY, POPOVICH AND CERCONE, JJ.

OPINION BY POPOVICH, J.: FILED JUNE 22, 1984

This is an appeal from an order of the Court of Common Pleas of Philadelphia denying the Petition for Relief

under the Post-Conviction Hearing Act (PCHA), 42 Pa. C.S.A. 9541 *et seq.*, of appellant, Dorothy Finley. On October 17, 1975, after a non-jury trial, appellant was convicted of murder in the second degree, robbery, carrying firearms without a license, possessing instruments of crime, prohibited offensive weapon and criminal conspiracy. Since the convictions involved a homicide, direct appeal was taken to the Pennsylvania Supreme Court, where all the judgments of sentence were affirmed by Per Curiam Opinion at *Commonwealth v. Finley*, 477 Pa. 211, 383 A.2d 898 (1978). On appeal to the Supreme Court, appellant raised two issues: (1) whether there was sufficient evidence to support the verdicts and (2) whether the search warrant was based on illegally obtained evidence rendering the evidence obtained pursuant thereto inadmissible. The Supreme Court "found no merit in either of these arguments." *Commonwealth v. Finley, supra*, p. 898.

On April 9, 1979, appellant filed a *pro se* PCHA petition which merely repeated the allegations raised in direct appeal to the Pennsylvania Supreme Court. This PCHA petition was denied without a hearing and without appointment of counsel because "[i]n the instant petition the petitioner again raises the precise issues previously raised on appeal. . . ." Opinion, Blake, J., at 2. Subsequently, an appeal of the decision of the PCHA court was taken to the Pennsylvania Supreme Court which vacated the lower court order and remanded the case to the lower court with instructions that counsel be appointed for appellant if she were found to be indigent. In compliance with that Order, Michael A. Seidman, Esquire, of Philadelphia, was appointed counsel for appellant. Mr. Seid-

man concluded that no arguably meritorious issues existed for appellant in her PCHA petition, whereupon he was instructed by the lower court to adopt the following procedure:

> Counsel was instructed that where he had completed a comprehensive review of the entire record and the applicable law, and had interviewed defendant and concluded that the record was devoid of arguably meritorious contentions, counsel should write this court in letter form detailing not only the nature and extent of his review, but also listing each issue Defendant wished to have raised, followed by an explanation why those issues were meritless. At that point, this Court would conduct its own independent review and, if our conclusions coincided with counsel's the Petition would be dismissed without a hearing and the Defendant would be apprised of her appellate rights. Opinion Blake, J. at 5.

Counsel adhered to those guidelines and wrote the following letter to the court:

> I have reviewed the Notes of Testimony in the above matter and I have met with the defendant to discuss her Post Conviction Hearing Act Petition. I cannot find any issues to raise on her behalf that are of arguable merit. In addition, my client, Mrs. Finley, did not find any issues that she wished to raise other than the issues raised in her pro se petition. One of these issues deals with the sufficiency of the evidence. The Commonwealth's evidence consisted primarily of eyewitness testimony. The sufficiency of that testimony was a matter of credibility which was decided against the defendant by the waiver Judge. The other issue involved the search warrant which was finally litigated on direct appeal to our Supreme Court. See 383 A.2d 898 (1978). Consequently, I respectfully request to be relieved of my appointment in this matter.

Mr. Seidman was thereafter relieved, and the Petition was dismissed. New counsel was appointed to represent appellant in the instant appeal from that order.

In this appeal, appellant claims that she was denied effective assistance of counsel where the PCHA court-appointed counsel, Mr. Seidman, failed to file an amended PCHA petition and brief on behalf of his client and chose instead to outline for the court reasons why a PCHA petition would be meritless. We hold that the procedure followed below resulted in ineffectiveness of counsel. Accordingly, we vacate the order below and remand for present counsel to represent appellant in the filing of an amended PCHA petition.

Pennsylvania law concerning procedures to be followed when a court-appointed attorney sees no basis for an appeal is derived from the seminal case of *Anders v. California*, 386 U.S. 738, 87 S.Ct. 1396 (1967) rehrg. denied at 388 U.S. 924, 87 S.Ct. 2094. The Court in *Anders* applied a three-pronged formula, which, if scrupulously applied, will allow court-appointed counsel to withdraw from a case. If the attorney, after a conscientious evaluation of the record, finds his case to be "wholly frivolous", he may so advise the court and request permission to withdraw. He must, however, accompany his request with a brief referring to anything in the record which will "arguably" support an appeal. A copy of that brief should then be furnished to the indigent within enough time to allow the latter to pursue an appeal, either counselled or *pro se*. The *court*, after a full examination of the record, then decides whether the case is wholly frivolous; and, if it so finds, it may grant counsel's request to withdraw.

The procedure outlined above allows for the situation where counsel believes an appeal would be wholly frivolous but concurrently provides safeguards for the right of an indigent to enjoy the same zealous representation available to defendants able to afford private counsel.

Anders was adopted in Pennsylvania in *Commonwealth v. Baker*, 429 Pa. 209, 239 A.2d 201 (1968), wherein *Anders* was read as offering two choices to the court-appointed advocate: (1) he may file briefs and argue the case on behalf of his client as an advocate; or (2) he may choose to withdraw his services, in which case he must adhere to the *Anders* procedure.

Baker involved an appeal to the Supreme Court after relief was denied by our court. The instant case, however, arises from appellant's initial PCHA petition. The threshold inquiry must be, therefore, whether *Anders* applies; if we answer affirmatively, only then may we evaluate whether its requirements are met.

Commonwealth v. Lohr, — Pa. —, 468 A.2d 1375 (1983) arose as a result of appellant's filing a second PCHA petition after the time for appeal from the Superior Court's denial of relief from his first PCHA petition had passed. The Superior Court had affirmed the dismissal, without hearing, of appellant's second PCHA petition, and the appellant proceeded *pro se* to the Supreme Court armed, *inter alia*, with a fresh claim of ineffectiveness, which the Court chose to address. Appellant contended that appointed PCHA counsel was ineffective in failing to amend appellant's first *pro se* post-conviction petition and in failing adequately to pursue, as ordered, an appeal to the Supreme Court. The majority

prescribed application of *Commonwealth v. McClendon*, 495 Pa. 467, 434 A.2d 1185 (1981) in a case where counsel believes appeal is frivolous.

McClendon was a direct appeal where the court held that the requirements of *Anders* must be met. The Court felt obliged to determine whether the lower court was correct in its assessment of complete frivolity. It was only after it made that determination that the Court inquired as to whether the brief submitted complied with *Anders*. Under the circumstances, it found that compliance was unnecessary.[1] In affirming, the Court says

> "[t]he major thrust of *Anders* was to assure a careful assessment of any available claims that an indigent might have. That end is achieved by requiring counsel to conduct an exhaustive examination of the record and by also placing the responsibility on the reviewing court to make an independent determination of the merit of the appeal. . . . Once we are satisfied with the accuracy of counsel's assessment of the appeal as being wholly frivolous, counsel has fully discharged his responsibility." at 1188.

Although the Court in *Lohr* held that counsel's actions were outside the requirements of *McClendon*, in which the court echoes *Anders*, it, nevertheless, affirmed, stating that

> " . . . the goal pursued by *McClendon, review of the merit of the appeal,* is fulfilled by the instant review, negating the possibility of prejudice inuring to appellant from the omissions of counsel. Furthermore, notwithstanding counsel's dereliction, any relief this Court might extend to appellant would be merely duplicitous [sic] of the instant review and, thus, con-

---

1 See page [25], *infra*.

sistent with principles of judicial economy, we decline the opportunity to remand for proceedings consistent with *McClendon.*" (Emphasis added) at 1379.

Anders has been applied in similar circumstances, and, therefore, we hold that its application to the instant case is proper. Counsel's brief does not satisfy the requirements of *Anders* in that it does not set forth any issues of arguable merit, nor is there evidence that it was provided to appellant within enough time for her to proceed *pro se* or to obtain new counsel. Notwithstanding these deficiencies, *McClendon* and *Lohr* offer us the opportunity to review the merits of the appeal. We decline, however, to follow the procedures utilized in *McClendon* and *Lohr.* We take a position which distinguishes this case from *Lohr,* based in part on the rationale behind the Supreme Court's remand for appointment of counsel.

The Supreme Court remanded, not because it saw any particular merit to the two contentions at issue, which were identical to those disposed of earlier in appellant's direct appeal. The Court stated, in remanding appellant's first PCHA appeal, "[c]ounsel for a PCHA petitioner can more ably explore legal grounds for complaint, investigate underlying facts, articulate claims for relief and promote efficient administration of justice." *Commonwealth v. Finley,* 497 Pa. 332, 440 A.2d 1183, 1184 (1981). The Supreme Court wished to afford appellant the opportunity to amass other issues with arguable merit. It is obvious that the issues listed by appellant in her *pro se* petition were meritless as they had previously been so described by the Pennsylvania Supreme Court. Moreover, Pa.R.Crim.P. 1504, in affording counsel, means that counsel should act as an advocate in fulfilling his role.

> " . . . it is not enough simply for the PCHA court to appoint counsel. For this settled rule 'also envisions that counsel so appointed shall have the opportunity and in fact discharge the responsibilities required by representation.' " *Commonwealth v. Lowenberg,* 493 Pa. 231, 425 A.2d 1100 (1981) quoting from *Commonwealth v. Fiero,* 462 Pa. 409, 413, 341 A.2d 448, 450 (1975).

Fiero involved an appellant-authored PCHA petition filed after counsel was appointed and prior to which there had been no direct appeal taken. Since counsel had neither amended the petition nor filed a brief, the court held that "[t]hese facts compel the conclusion that the proceeding was in fact uncounselled." *Id.* at 450. The court required "*meaningful* participation by counsel."

If we were to hold that the requirements of *Anders* were not met but concomitantly review the merits of the appeal and possible affirm as in *McClendon,* we would run into a further obstacle. The affirmance which was the outcome of *McClendon* was based on the "accuracy of counsel's assessment of the appeal", including "an exhaustive examination of the record", *Commonwealth v. McClendon, supra,* at 1188.

Here, there is no mention of an exhaustive search nor the required finding that the case is wholly frivolous.[2]

---

[2] Progeny of *Anders* have provided us with a continuum of degrees of "meritless". Counsel's request to withdraw may only be granted if the court finds the case to be "wholly frivolous"; it may not be entertained if the appeal merely has "arguable merit" nor if it lacks merit. Mere absence of merit is not enough to support a request to withdraw or the granting of it. *Commonwealth v. Greer,* 455 Pa. 106, 314 A.2d 513 (1974); *Commonwealth v. Worthy,* 301 Pa. Super. 46, 446 A.2d 1327 (1982).

Counsel must certify to an exhaustive reading and endeavor to uncover all possible issues for review so that the frivolity of the appeal may be determined by the lower court, or, as in *Lohr*, at the appellate level.[3]

In the instant case, notwithstanding the fact that the *pro se* petition raised identical issues to those raised on direct appeal, we have a mandate from the Supreme Court with express instructions to appoint counsel and allow appellant to " . . . upon request, amend her petition." This remand carries with it a strengthening obligation to assess the quality of appellant's case in an arena wherein she is accompanied by a zealous advocate.

In accordance with the spirit of *Lohr* and *McClendon* and the manner in which they were disposed of on appeal, it should be noted that *McClendon* reduces the *Anders* requirements to a practical level.

> "If . . . 'wholly frivolous' means that there are no points present that 'might arguably support an appeal' counsel is saddled with an impossible burden, if he is nevertheless required to file a brief containing arguments that are non-existent. If on the other hand, there are claims of arguable merit, even though counsel may not have any confidence in them, . . . the appeal is not 'wholly frivolous' and counsel is not entitled to seek leave to withdraw." *Id.* at 1188.

---

[3] It should be noted, in view of the fact that the *Lohr* Court chose to review the case on the merits, that *Lohr* involved a second PCHA petition, whereas this case involved the dismissal of the first post-conviction petition. The Court was concerned with considerations of judicial economy. Additionally, the attorney in *Lohr* apparently submitted a short petition to appellant which he rejected in favor of his own. The issues which he presented are evaluated by the Court.

Here, without anything more than "the bare record available in the Superior Court" (Appellant's Brief at 19), appellant's present counsel has been able to list several issues which may have arguable merit. It is certainly conceivable that those same issues would have captured the attention of prior counsel upon an "exhaustive" reading of the record. (Indeed, it should be noted that Mr. Seidman only admits to having read the Notes of Testimony).[4] Here, the "no-merit letter" is insufficient in light of the fact that there appear to be arguably meritorious issues, and the sufficiency of counsel's perusal of the record is not reflected.

It is also possible that appellant was never informed of her right to proceed *pro se* as she contends she was never given a copy of the letter written by counsel. The court in *Commonwealth v. Baker*, *supra*, states that the third requirement of *Anders* is the most important. "Anders clearly commands . . . that the client be given a copy of counsel's brief *in time to present the appeal in propria persona.*" *Id.* at 203.

Since the procedures utilized herein were defective, they acted to deprive appellant of her right to adequate representation. We remand for an evidentiary hearing on the claims raised in appellant's brief and any other issues discerned by counsel after an exhaustive search of the record in accordance with this opinion. Jurisdiction is relinquished.

ROWLEY, J. notes his dissent.

---

[4] Moreover, counsel states in his letter that the sufficiency issue was a matter of credibility for the Judge and that the other issue was finally disposed of by the Supreme Court when, in fact, both issues were before that Court.

SUPREME COURT OF PENNSYLVANIA

Eastern District

COMMONWEALTH OF PENNSYLVANIA,

Appellant

v.

DOROTHY FINLEY,

Appellee.

No. 14 E.D. Appeal Docket, 1985

JUDGMENT

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the appeal having been improvidently granted, the same is hereby dismissed.

BY THE COURT:

/s/ Marlene F. Lachman, Esq.
Prothonotary

Dated: April 23, 1986

J # 154-85

IN THE SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

COMMONWEALTH OF PENNSYLVANIA,

Appellant

v.

No. 14 E.D. Appeal Dkt. 1985

Commonwealth's Appeal by Permission from the June 22, 1984 Decision of the Superior Court at No. 2978, Philadelphia, 1982, Remanding for an Evidentiary Hearing under the Post-Conviction Hearing Act as of Nos. 1128-1132, May Session, 1975, Philadelphia Court of Common Pleas, Criminal Trial Division

330 Pa. Superior Ct. 313, 479 A.2d 568 (1984)

DOROTHY FINLEY,

Appellee

ARGUED: October 23, 1985

ORDER

PER CURIAM

FILED: APRIL 23, 1986

Appeal dismissed as having been improvidently granted.

---

(3)

No. 85-2099

In The
Supreme Court of the United States
October Term, 1986

COMMONWEALTH OF PENNSYLVANIA,
Petitioner,

v.

DOROTHY FINLEY,
Respondent.

ON WRIT OF CERTIORARI TO THE SUPERIOR COURT OF PENNSYLVANIA

BRIEF FOR PETITIONER

GAELE MCLAUGHLIN BARTHOLD*
Deputy District Attorney
ANN C. LEBOWITZ
Assistant District Attorney
LAURIE MAGID
Assistant District Attorney
HUGH J. BURNS, JR.
Assistant District Attorney
RONALD EISENBERG
Chief, Appeals Unit
WILLIAM G. CHADWICK, JR.
First Assistant District Attorney
RONALD D. CASTILLE
District Attorney

*Counsel of Record

OFFICE OF THE DISTRICT ATTORNEY
1300 Chestnut Street
Philadelphia, Pennsylvania 19107
Telephone: (215) 875-6010

November 25, 1986

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
or call collect (402) 342-2831

HOPE

QUESTIONS PRESENTED

1. Is *Anders v. California*, 386 U.S. 738 (1967), applicable to collateral review proceedings?

2. Where the Pennsylvania Supreme Court previously affirmed respondent's murder conviction on a counselled direct appeal, and where newly appointed counsel found no issues on which to base a subsequent claim for collateral relief, do the sixth and fourteenth amendments require appointed counsel to file an advocate's brief or petition with the state post-conviction hearing judge?

3. Are indigent criminal defendants, who have no federal constitutional right to counsel on collateral review, entitled to compel post-conviction litigation of claims which appointed counsel deems non-meritorious?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

STATE CASES

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

No. 85-2099

In The

Supreme Court of the United States

October Term, 1986

COMMONWEALTH OF PENNSYLVANIA,

Petitioner,

v.

DOROTHY FINLEY,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPERIOR COURT OF PENNSYLVANIA

BRIEF FOR PETITIONER

OPINIONS BELOW

The Opinion and Judgment of the Pennsylvania Superior Court, which is the highest state court to render a decision on the merits of this case, is reported at 330 Pa. Super. 313, 479 A.2d 568 (1984), and set forth in the Joint Appendix at pages 18-27.[1] The unreported opinion of the

[1]Following the decision of the Superior Court, which is Pennsylvania's intermediate appellate court, petitioner timely requested discretionary state supreme court review. Petitioner's application was initially granted and the case was fully briefed and argued at the state supreme court's October 1985 Session. On April 23, 1986, however, the Pennsylvania Supreme Court dismissed the appeal as "improvidently granted." This order is reproduced in the Joint Appendix at pages 28-29. Under Pennsylvania law, the state supreme court's refusal to review is not a decision on the merits. *See Commonwealth v. Britton*, 509 Pa. 620, 506 A.2d 895 (1986); *Dayton v. Dayton*, 509 Pa. 632, 506 A.2d 901 (1986); *Commonwealth, Liquor Control Bd. v. Ronnie's Lounge, Inc.*, 485 Pa. 72, 400 A.2d 1317 (1979).

Philadelphia Court of Common Pleas, which was filed on February 23, 1983. is set forth in the Joint Appendix at pages 10-17.

———o———

STATEMENT OF JURISDICTION

The Pennsylvania Superior Court's Judgment was entered on June 22, 1984. On April 23, 1986, the Pennsylvania Supreme Court declined to exercise authority in the case. The petition for writ of certiorari was timely filed on June 20, 1986, and granted on October 6, 1986. The jurisdiction of this Court to review the Judgment of the Superior Court of Pennsylvania rests on 28 U.S.C.A. § 1257 (3) (1966 & Supp. 1986).[2]

———o———

[2]The Judgment under review was entered by a three-judge panel of the Pennsylvania Superior Court. Panel judgments of the appropriate appellate court are reviewable on certiorari provided that the court was the highest court in which a decision could be had. *See Local 174, International Brotherhood of Teamsters v. Lucas Flour Co.*, 369 U.S. 95, 98-101 (1962). *See Pennsylvania v. Henderson*, 446 U.S. 905 (1980) (writ of certiorari to Pennsylvania Superior Court). Under Pennsylvania practice, appeals are heard before the Superior Court *en banc* or by a panel "as determined by the court in its discretion." Pa.R.App.P. 3721. There is no right to reargument of a panel decision before the *en banc* court, *see* Pa.R. App.P. 3723, nor is a request for *en banc* reargument a prerequisite to discretionary review in the state supreme court. *See* Pa.R.App.P. 1113. Since the state supreme court ultimately declined to review this case, the Superior Court panel is the highest state court in which a decision on the federal questions could be had. *See American Ry. Express Co. v. Levee*, 263 U.S. 19 (1923); *Interstate Circuit, Inc. v. City of Dallas*, 390 U.S. 676, 678 n.1 (1968).

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Amendment Six, which provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial . . . and to have the assistance of counsel for his defense.

United States Constitution, Amendment Fourteen, which provides:

> . . . No state shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

———o———

STATEMENT OF THE CASE

Respondent, a Philadelphia drug dealer known to narcotics officers as "Black Dot," was convicted of second-degree murder and related offenses for the April 15, 1975 shooting of a competing drug dealer. The victim, Melvin Clark, who was shot inside his Philadelphia residence, died as a result of gunshot wounds to the shoulder and head. Two anonymous sources subsequently informed police that Clark, who sold drugs from his Silver Street home, was the victim of an on-going drug war with respondent, the biggest narcotics dealer in the Eleventh Street area. After these tips were corroborated by police records and statements were obtained from co-defendant Garfield Hedgman, police obtained a search warrant for respondent's apartment (N.T. Suppression Hearing, 14-20, 24-28, 65-74,

79-86; Prattis, J., Findings of Fact and Conclusions of Law Sur Defendant's Motion to Suppress Physical Evidence). Ballistics evidence confirmed that a bullet removed from the victim's body was fired from the .22 caliber Colt revolver found in respondent's bedroom closet (N.T. 10/14/75, 68-69, 80-81; N.T. 10/16/75, 3-16).

Represented by court-appointed counsel, David Zwanetz, Esquire, respondent successfully litigated a pre-trial motion to suppress statements which she gave police the night of her arrest. The companion motion to suppress the murder weapon, however, was denied (Prattis, J., Findings of Fact and Conclusions of Law). Respondent's case was listed for trial before a judge unfamiliar with the suppressed evidence. After a full on-the-record colloquy, respondent voluntarily waived her right to a jury trial and elected to be tried by the Honorable Armand Della Porta, sitting as trier-of-fact (N.T. 10/14/75, 3-37).[3]

Between October 14 and October 17, 1975, respondent was tried before Judge Della Porta. The principal prosecution witness, Garfield Hedgman, testified that he was at the decedent's home to purchase drugs when the murder occurred. Also present were respondent and another individual whom Hedgman identified as "Red Dude." According to Hedgman, respondent had agreed to loan him a "nickel" (five dollars) so that he could buy narcotics from Clark. Hedgman needed the money because Clark

[3]Initially, the case was listed for a jury trial before the late Honorable Samuel Smith, who earlier presided at the jury trial of respondent's son, Tyrone. When respondent decided to waive a jury, Judge Smith recused himself (N.T. 10/14/75, 3). Her case, therefore, was relisted before Judge Della Porta.

had raised his price and refused to "stand it short." Before the transaction could be completed, "Red Dude" drew a gun and fired at Clark.

The victim's screaming wife begged the intruders not to hurt her or her baby. Respondent answered for the conspirators and assured the woman that no one would hurt her or the child. Taking the victim's wife with them, respondent and Hedgman then went upstairs to search for drugs. Upon completing the search the parties left. While leaving, Red Dude fired two more shots into the victim's head. Respondent and the shooter fled in respondent's car, which was driven by her son Tyrone.[4] Before driving away, they handed Hedgman a quantity of drugs and told him to "split" (N.T. 10/15/75, 6-20, 23-24).

Respondent's defense was that she spent the afternoon of Clark's murder at her physician's office, at the pharmacy getting her prescription, and at the supermarket buying fruits and vegetables. Neither her doctor, nor her pharmacist, however, could pinpoint the exact time of her visits (N.T. 10/15/75, 73, 76-77, 81, 86-87). Moreover, since the supermarket was only two blocks from the victim's home, respondent's own testimony placed her in the neighborhood of the crime scene near the time of the murder (N.T. 10/15/75, 169-170).

Respondent's attempts to explain the murder weapon's location were equally unconvincing. One of her witnesses,

[4]Tyrone Finley was separately tried and convicted of third degree murder. Because his inculpatory statement was suppressed and the admissible evidence established only his "mere presence" outside the murder scene, his conviction was reversed on direct appeal. *See Commonwealth v. Finley*, 477 Pa. 382, 383 A.2d 1259 (1978). The prosecution's case against respondent, of course, was much different.

Ronald Brown, testified that Garfield Hedgman gave him a bag which he (Brown) purportedly put in respondent's closet without her knowledge (N.T. 10/15/75, 109-110). Brown, a close friend of respondent's daughter, claimed that this bag contained the weapon. His testimony, however, was inconsistent with his previous statements to police and directly contradicted the testimony of the police officer who executed the search warrant (N.T. 10/16/75, 5). Not one of the three guns found in respondent's closet was in a bag; in fact, the package described by Brown was never located.

The trial judge, resolving credibility issues adversely to respondent, convicted her of second-degree murder, robbery, criminal conspiracy and weapons offenses. Following the denial of the extensive post-verdict motions filed by her appointed counsel, respondent was sentenced to life imprisonment for the murder and to lesser concurrent prison terms for robbery, conspiracy, and possessing an instrument of crime.

Still represented by her appointed trial attorney, respondent appealed to the state supreme court.[5] That court rejected the arguments raised in counsel's full brief on the merits and unanimously affirmed. *See Commonwealth v. Finley*, 477 Pa. 211, 383 A.2d 898 (1978).

---

[5]The state supreme court then had direct appellate jurisdiction in all felonious homicide cases. See 42 Pa.Cons.Stat.Ann. § 722(1) (Purdon 1981). Since November 22, 1980, however, felonious homicide appeals, with the exception of death cases, lie in the Pennsylvania Superior Court. *See Commonwealth v. Jones*, 501 Pa. 162, 460 A.2d 739 (1983); *Commonwealth v. DeBose*, 501 Pa. 399, 461 A.2d 797 (1983).

Respondent next sought state court collateral review in the Philadelphia Court of Common Pleas. Her *pro se* Post Conviction Hearing Act petition raised precisely the same issues which were previously rejected by the state supreme court on direct appeal. Because these issues had been finally litigated under former Pa.Stat.Ann. tit. 19, § 1180-4 (Purdon 1966) (repealed 1982), substantially reenacted as 42 Pa.Cons.Stat.Ann. § 9544 (Purdon 1982), the Common Pleas Court summarily denied her petition without a hearing and without the appointment of counsel.

Respondent, through new appointed counsel, Paul Gordon Hughes, Esquire, again appealed to the state supreme court. This appeal did not identify any substantive claims of error, but alleged only entitlement to P.C.H.A. counsel. The state supreme court remanded the case to the Court of Common Pleas with instructions to determine whether respondent was indigent and, if so, to appoint counsel for proceedings under the Post Conviction Hearing Act. *See Commonwealth v. Finley*, 497 Pa. 332, 440 A.2d 1183 (1981) (J.A. 6-8).

On remand, the lower court appointed new post-conviction counsel, Michael A. Seidman, Esquire, who reviewed the notes of testimony and consulted with his client. Based on his advocate's review of the record, Mr. Seidman concluded that there was no even arguable basis for collateral relief. He so advised the court by letter and requested permission to withdraw from the case. His letter discussed the two finally litigated claims which respondent had raised in her *pro se* petition and wished to pursue, and stated that respondent had identified no additional claims which she wanted counsel to raise (J.A. 9).

Upon receipt of counsel's letter, the post-conviction court judge, the Honorable Edward J. Blake, conducted his own independent review of the case and similarly concluded that the record was devoid of arguably meritorious issues. Judge Blake specifically refused to compel counsel to "find" an issue when counsel, exercising his best professional judgment, had responsibly determined that there was no basis for relief (J.A. 13-14). In rejecting any suggestion that counsel's acceptance of a court appointment thereby required him to pursue, or invent, frivolous collateral claims, Judge Blake reasoned that such a requirement ill serves indigent defendants, debases the legal profession, and undermines the integrity of the criminal justice system (J.A. 16). He, therefore, permitted Mr. Seidman to withdraw, and dismissed respondent's petition.

Represented by Catherine M. Harper, Esquire, fourth court-appointed and current counsel, respondent appealed the petition's dismissal to the Pennsylvania Superior Court. On June 22, 1984, a panel of that court remanded the case for further post-conviction proceedings because prior post-conviction counsel did not comply with the formal requirements of *Anders v. California*, 386 U.S. 738 (1967). The state supreme court subsequently declined to exercise its discretionary authority in the case. A timely petition for writ of certiorari was thereafter filed with this Court and granted on October 6, 1986.

———o———

SUMMARY OF ARGUMENT

Anders v. California, 386 U.S. 738 (1967), adopted strict briefing and notice requirements so as to protect the then recently recognized constitutional right of indigent criminal defendants to meaningful first appeals where such appeals are provided by a state. These procedures need not, and ought not, be extended to collateral review proceedings.

There is no federal constitutional right to counsel on collateral review. The mere voluntary provision of such assistance, for reasons of policy and efficiency, does not justify *Anders* application in this forum. Were this to occur, *Anders*—which was intended merely to protect an underlying constitutional right—would improperly raise to constitutional dimension any state-created grant of counsel on collateral review.

States must be free to experiment and to adopt procedures which best promote the fair and proper administration of justice without being required to shoulder additional illogical and unnecessary burdens. *Anders* procedures have proved cumbersome and difficult to apply. In part, *Anders* practical effect has been to invert equal protection. Under its mandate, indigent defendants with frivolous issues achieve more considered appellate review than their wealthier counterparts whose retained attorneys raise substantive but meritless claims.

Indigent defendants need not, in the name of equal protection, be provided with all that wealthy defendants are capable of purchasing. Fundamental fairness requires only that indigents be able adequately to present their

claims within the adversary system and that they have meaningful access to the courts.

Application of *Anders* on collateral review is not required to vindicate defendants' rights to due process or equal protection. This Court has recognized that the protection of indigent defendants may, in some circumstances, be appropriately limited and that lines may be drawn. A proper limit and line was here recognized and drawn by the post-conviction court judge. He appropriately declined to apply *Anders* and instead accepted a well-considered "no-merit" letter. This Court must reinstate that decision and find *Anders* inapplicable on collateral review.

———o———

ARGUMENT

The Procedures Mandated By This Court In Anders v. California, 386 U.S. 738 (1967), Ought Not To Extend To Collateral Review Proceedings.

Twenty years ago this Court substantially limited the ability of a court-appointed counsel to withdraw from a first direct appeal which he deemed frivolous. *See Anders v. California,* 386 U.S. 738 (1967). The Court's strict briefing and notice requirements provided, *inter alia,* that counsel, based on his assessment of the appeal's frivolity, must accompany his motion to withdraw with "a brief referring to anything in the record that might arguably support the appeal." *Id.,* 386 U.S. at 744. These procedures were intended to protect the indigent criminal

defendants' then recently recognized right to counsel in first state court direct appeals where state procedures provided such appeals as of right. *See Douglas v. California,* 372 U.S. 353 (1963).

This case presents the question left open by *Anders:* the applicability of its procedures to collateral review proceedings. Respondent, Dorothy Finley, had the benefit of a counselled state court direct appeal. Following its denial she sought state court collateral review, asserting only previously decided and, thus, finally litigated, claims under Pennsylvania law. Pa.Stat.Ann. tit. 19, § 1180-4 (Purdon 1966) (repealed 1982), substantially reenacted as 42 Pa.Cons.Stat.Ann. § 9544 (Purdon 1982). Counsel was nevertheless appointed under state court procedural rules, Pa.R.Crim.P. 1503 and 1504 (Appendix A), which, for reasons of policy and efficiency, have guaranteed indigent defendants the right to counsel for first post-conviction petitions and all subsequent petitions raising new issues. *See Commonwealth v. Finley,* 497 Pa. 332, 440 A.2d 1183 (1981) (J.A. 6-8); *Commonwealth v. McClinton,* 488 Pa. 598, 413 A.2d 386 (1980); *Commonwealth v. Mitchell,* 427 Pa. 395, 235 A.2d 148 (1967).

Appointed counsel, after meeting with his client and reviewing the record, concluded that there were no arguably meritorious issues to be raised on her behalf. He sought, therefore, to withdraw pursuant to a "no-merit" letter (J.A. 9). Following procedures intended to scrupulously protect respondent's rights (J.A. 13-14), the collateral review court allowed withdrawal. The Pennsylvania Superior Court reversed, however, believing that it

was constitutionally required to do so (J.A. 22-24).[6] This Court must hold otherwise. *Anders* extension to collateral review is impractical, unwise, and constitutionally unnecessary.[7]

Anders may warrant clarification, but certainly does not warrant expansion. *Anders* practice is already so confused, and counsel's *Anders* dilemma to acute, that any *Anders* extension will seriously deter the proper administration of justice.[8] Many courts have found the with-

---

[6]The decision below relies exclusively on this Court's interpretation of the federal constitution in *Anders*, and on state cases which, in turn, are based on federal precedent. *See Commonwealth v. Lohr*, 503 Pa. 130, 468 A.2d 1375 (1983); *Commonwealth v. McClendon*, 495 Pa. 467, 434 A.2d 1185 (1981); *Commonwealth v. Baker*, 429 Pa. 209, 239 A.2d 201 (1968). Even where state grounds are intermixed in a lower court's holding, the state court's reliance on federal grounds warrants review by this Court. *See Oregon v. Kennedy*, 456 U.S. 667-671 (1982).

[7]Pennsylvania's misguided perception of constitutional necessity has permitted *Anders* to assume a life of its own. The Pennsylvania Superior Court has since further extended *Anders* to probation revocation appeals, and has directed the Commonwealth to file "a *responsive* brief to counsel's *Anders* brief." *Commonwealth v. Thomas*, 511 A.2d 200 (Pa. Super. Ct. 1986) (emphasis in original). Requiring the prosecutor to brief the so-called merits of an admittedly frivolous defense appeal, is both unreasonable and illogical. Far more practical is the District of Columbia rule; there, counsel who files an *Anders* brief and asks to withdraw is instructed to file his brief and motion with the clerk of court, but is specifically precluded from serving the government. *Suggs v. United States*, 391 F.2d 971 (D.C. App. 1968).

[8]According to one career defender, *Anders* improperly encourages frivolous appeals, undermines the integrity of the *in informa pauperis* bar, and delays appellate review of meritorious claims. *See* Doherty, *Wolf! Wolf!—The Ramifications of Frivolous Appeals*, 59 J. Crim. L. Criminology & Police Sci. 1 (1968).

(Continued on following page)

drawal procedures and shizophrenic briefing requirements of *Anders* impossible to apply. These courts perceive little logic to a procedure requiring an advocate's brief

---

(Continued from previous page)

While an increased number of non-meritorious appeals may be the necessary price for our universal system of direct review where every indigent defendant is entitled under *Douglas* to one free appeal, there must be some limits on a convicted defendant's right to pursue non-meritorious litigation. Such a limit is properly imposed on collateral review. Courts in Arizona and Illinois have concluded that *Anders* does not apply on state court collateral review. *See People v. McCarty*, 17 Ill. App. 3d 796, 308 N.E.2d 655 (1974); *State v. Thompson*, 139 Ariz. 552, 679 P.2d 575 (1984). *See also State v. Shattuck*, 140 Ariz. 582, 684 P.2d 154 (1984) (*Anders* applies to first direct appeal only; "system is strained to the point that we cannot afford the luxury of repeated review of trivia or issues of small merit"). *Contra, Robbins v. State*, 288 Ark. 311, 705 S.W.2d 6 (1986) (where the Arkansas Supreme Court mechanically applied *Anders* on collateral review); *Ex parte Sawyer*, 543 S.W.2d 143 (Tex. Crim. App. 1976) (mechanical application of *Anders* to habeas actions challenging extradition and to bail appeals); *White v. State*, 380 N.W.2d 1 (Iowa Ct. App. 1985) (collateral proceeding; withdrawal based on frivolity governed by Iowa Appellate Rule 104 which follows *Anders*).

In *United States ex rel. Curtis v. Illinois*, 521 F.2d 717, 720 (7th Cir.), *cert. denied*, 423 U.S. 1023 (1975), the court held *Anders* applicable only to direct appeals and not to post-conviction hearings. The three-judge panel included Justice Clark, *Anders'* author, sitting by designation following his retirement from this Court. *But see Dinkins v. Alabama*, 526 F.2d 1268, 1269 (5th Cir.), *cert. denied*, 429 U.S. 842 (1976); *United States ex rel. Banks v. Henderson*, 514 F.2d 1000, 1001 (2d Cir. 1975), in which the courts, essentially without discussion, applied *Anders* to permit federal habeas counsel to withdraw. There is, of course, little opportunity for federal courts to consider *Anders* on habeas since counsel is not appointed until the case has been pre-screened to determine if any non-frivolous issues have been raised. 28 U.S.C.A. § 1915(d) (1966). While the federal courts have decided to use a pre-screening procedure, the states must be free to use any procedure which meets constitutional requirements. As will be shown, the attorney's no-merit letter here tendered is a constitutionally acceptable alternative.

on anything "arguable" when counsel has already concluded that the appeal is wholly frivolous.[9] At least five states have concluded that *Anders* is so unworkable that they simply refuse to entertain any petitions to withdraw based on frivolity. Thus, in Colorado, Idaho, Indiana, Massachusetts and Missouri, counsel must brief every case on the merits, regardless of counsel's assessment of its merits.[10]

---

[9]*See e.g. State v. McKenney,* 98 Idaho 551, 568 P.2d 1213 (1977) (Idaho will not folow impractical and illogical procedure of *Anders*); *State v. Banks,* 541 P.2d 808 (Utah 1975) ("we doubt the soundness and propriety of insisting that a defendant is entitled to what counsel in good faith believes to be an entirely meritless appeal"). A number of states sought to clarify *Anders* by attempting to distinguish between issues that were "arguable," but not meritorious, and those that were outright frivolous. While some issues are plainly more frivolous (*i.e.* less meritorious) than others, *see Commonwealth v. Shea,* 398 Mass. 264, 496 N.E.2d 631 (1986), efforts to develop a meaningful definition of what constitutes a frivolous appeal have provided little guidance. *See Commonwealth v. Moffett,* 383 Mass. 201, 418 N.E.2d 585 (1981) ("Although we have defined a frivolous appeal as one that 'not merely [lacks] merit, but would not have a prayer of a chance' . . . we agree with those courts and commentators who have rejected or downplayed any distinction between frivolous and meritless appeals for purposes of assessing appointed counsel's obligation under *Anders.*"). *See also* Hermann, *Frivolous Criminal Appeals,* 47 N.Y.U.L. Rev. 701 (1972). Perhaps the only workable definition was suggested by the California Superior Court. *See People v. Johnson,* 123 Cal. App. 3d 106, 176 Cal. Rptr. 390 (1981), *cert. denied,* 457 U.S. 1108 (1982), which defines an arguable issue as one that has a reasonable potential for success and which, if successful, will result in either a reversal or modification of judgment.

[10]COLORADO: *McClendon v. People,* 174 Colo. 7, 481 P.2d 715 (1971) (counsel should brief appeal as best he can and forego oral argument); IDAHO: *State v. McKenney,* 98 Idaho 551, 568 P.2d 1213 (1977) (if appeal is frivolous, less of the court's and counsel's time will be expended in directly con-

(Continued on following page)

Federal *Anders* practice also has been less than consistent and has, on occasion, been strained. Some courts have noted that no-merit letters are insufficient under *Anders, see United States v. Johnson,* 527 F.2d 1328-1329 (5th Cir. 1976); *United States v. McCoy,* 518 F.2d 1293 (4th Cir. 1975); others seem to suggest no alternative when stating that counsel need not brief frivolous issues,

---

(Continued from previous page)

sidering the merits; no instance where counsel has been permitted to withdraw on frivolity); INDIANA: *Dixon v. State,* 152 Ind. App. 430, 284 N.E.2d 102 (1972) (no withdrawal from frivolous collateral appeal). Insofar as *Dixon* required appointed counsel to raise every frivolous issue that defendant wanted to raise, it was overruled by the Indiana Supreme Court in *Music v. State,* 489 N.E.2d 949 (Ind. 1986). *See also Smith v. State,* 173 Ind. App. 443, 363 N.E.2d 1295 (1977) (although court conducts *Anders*-type review on direct appeal, counsel should have complied with full briefing requirement of *Dixon);* MASSACHUSETTS: *Commonwealth v. Moffett,* 383 Mass. 201, 418 N.E.2d 585 (criticizes *Anders* procedure as cumbersome, impractical, and "Janus-faced"; even if an appeal is frivolous, court will expend less time and energy in direct review on the merits; counsel may not withdraw on grounds of frivolousness but may "dissociate" himself by so stating in preface in which case *Anders* notice requirements are enforced). Under Massachusetts practice, counsel can offer a disclaimer as to individual issues that he deems frivolous, but which his client wants to pursue. *Commonwealth v. Shea,* 398 Mass. 264, 496 N.E.2d 631 (1986). MISSOURI: *State v. Gates,* 466 S.W.2d 681 (Mo. 1971) (court will deny motions to withdraw on grounds of frivolousness; preferrable for counsel to remain in a weak or groundless appeal even at some cost to the concept of professional independence of the lawyer; counsel's appearance is not an implicit representation that he believes in the legal substantiality of claims advanced); *State v. Pinkus,* 550 S.W.2d 829 (Mo. Ct. App. 1977) (counsel commendably discharged his duty to raise all points that could be presented even where some of the thirteen issues raised were extremely strained and tenuous). *Compare People v. Green,* 61 A.D.2d 962, 403 N.Y.2d 247 (1978) (some appeals are so frivolous that the attorney has a duty not to make the argument even though it is more expedient than filing an *Anders* brief and motion to withdraw).

see Alvord v. Wainwright, 725 F.2d 1282 (11th Cir.), *cert. denied,* 459 U.S. 956 (1984); *United States v. Cain,* 544 F.2d 1113 (1st Cir. 1976). Courts occasionally have accepted *Anders* briefs without indicating in their opinions that the briefs included anything other than a statement that the appeal was frivolous. *See United States v. Buigues,* 568 F.2d 269 (2d Cir. 1978); *United States v. Barrow,* 540 F.2d 204 (4th Cir. 1976).

Given *Anders'* impossible requirements, the most logical position is that of *Nickols v. Gagnon,* 454 F.2d 467 (7th Cir. 1971) (Stevens, J.), *cert. denied,* 408 U.S. 925 (1972). Instead of emphasizing the word "brief" in *Anders,* the court there noted that an attorney need only refer to issues and not argue them. *Id.* at 468-469, 470-471, 472. While this view of an *Anders* brief seems to conflict with the *Anders* admonition not to act as an *amicus,* other courts have indicated that an attorney can submit a brief which presents or analyzes an issue and the relevant authority without arguing the merit of the issue. *See, e.g., Government of Virgin Islands v. James,* 621 F.2d 588 (3d Cir. 1980).

The Seventh Circuit has characterized *Anders* as requiring "a brief that will advise the court of what points he might have raised and why he thinks they would have been frivolous." *United States v. Edwards,* 777 F.2d 364, 366 (7th Cir. 1985). "This will assist the court in evaluating the defendant's pro se appeal, and will thus put the indigent defendant in about as good a position as that of the affluent defendant who can get a lawyer to make frivolous arguments on his behalf." *Id.* The First Circuit has referred to *Anders* to point out that frivolous claims take

time away from meritorious claims. *See United States v. Cain,* 544 F.2d 1113 (1st Cir. 1976).

Nor are these the only difficulties and disagreements caused by *Anders* in the federal courts. Although *Anders* was concerned with court-appointed appellate counsel, the Second Circuit has accepted an *Anders* brief from retained counsel. *See Grimes v. United States,* 607 F.2d 6 (2d Cir. 1979). Another problem not specifically considered by *Anders* is whether new counsel should be appointed if the motion to withdraw is denied. Defendants might well object to continued representation by attorneys precluded from withdrawing based on frivolity; few courts, however, have discussed this problem. The Second Circuit gave no indication that it appointed new counsel after denying *Anders* motions to withdraw. *See United States v. Stroman,* 667 F.2d 416 (2d Cir. 1981); *United States v. Evans,* 665 F.2d 54 (2d Cir. 1981).

Anders also did not specifically decide if an attorney must meet with the defendant before filing an *Anders* brief. Two circuits have found that such a meeting is highly desirable but not constitutionally required. *See United States ex rel. Russo v. Attorney General of Illinois,* 780 F.2d 712, 715 (7th Cir.), *cert. denied,* 106 S.Ct. 2922 (1986); *Smith v. Cox,* 435 F.2d 453, 458-459 (4th Cir. 1970), *vacated on other grounds sub nom., Slayton v. Smith,* 404 U.S. 53 (1971).[11]

---

[11]Pennsylvania's difficulties in administering *Anders* have been different, but no less severe. Indeed, its *Anders* practice has been described as "especially opaque." Hermann, 47 N.Y.U.L. Rev. 701, 708 n.39.

(Continued on following page)

Anders has also been severely criticized on the ground that it compels more vigorous appellate review of a case that counsel deems frivolous, *see* 386 U.S. at 745, than a

---

(Continued from previous page)

Commonwealth v. *Baker*, 429 Pa. 209, 239 A.2d 201 (1968), which adopted *Anders*, held that counsel seeking to withdraw from a frivolous appeal must file a separate petition to withdraw accompanied by a brief referring to anything in the record that might arguably support the appeal. Although *Baker* admonished counsel not to be an *amicus curiae*, the *Baker* court did not explain what counsel had to do to satisfy the *Anders* briefing requirement. Subsequent Pennsylvania cases unreasonably chastised defense counsel when, "in a conscientious effort to be honest with the court," counsel recited the facts and pertinent law, but then proceeded to demonstrate why the appeal was meritless. *See Commonwealth* v. *Perry*, 464 Pa. 272, 275, 346 A.2d 554 (1975); *Commonwealth* v. *Collier*, 489 Pa. 26, 413 A.2d 680 (1980). *See also Commonwealth* v. *Greer*, 455 Pa. 106, 314 A.2d 513 (1974) (requirement that counsel not act as *amicus curiae* strictly enforced; lack of merit not legal equivalent of frivolity). The cases inconsistently demanded that counsel file both a petition to withdraw finding the appeal wholly frivolous, and a supporting advocate's brief wherein counsel was precluded from explaining why the appeal was lacking in merit. *See Commonwealth* v. *Greer; Commonwealth* v. *Perry; Commonwealth* v. *Collier*. Because this interpretation of *Anders* made counsel's right to withdaw almost illusory, the Pennsylvania Supreme Court established a more flexible and enlightened approach to the briefing requirement and held that counsel could discharge his responsibility if he showed that he had reviewed the record as an advocate. *Commonwealth* v. *McClendon*, 495 Pa. 467, 434 A.2d 1185 (1981). It rejected the view that counsel's mere expression of why an appeal was without basis automatically made his brief an unacceptable *amicus curiae* brief. *See Nickols* v. *Gagnon*, 454 F.2d 467. *McClendon*, however, has not always been followed by Pennsylvania's intermediate appellate court, which views it as inconsistent with *Anders*. *See Commonwealth* v. *Thomas*, 511 A.2d at 202. Hence, the opacity of Pennsylvania *Anders* practice continues unabated.

case where counsel has filed the traditional advocate's brief.[12] To this extent, *Anders* represents a complete inversion of the equal protection doctrine, whereby the indigent defendant with only frivolous issues can achieve more considered appellate review than his wealthier counterpart whose retained counsel raises a substantive, albeit nonmeritorious, claim.[13] *See People* v. *Wende*, 25 Cal. 3d 436, 158 Cal. Rptr. 839 (1979); *State* v. *Clayton*, 639 P.2d 168 (Utah 1981) (unlike ordinary appeals, Utah courts will not affirm under *Anders* unless the appellate tribunal is unanimous in its decision).

The foregoing underscores the need for encouraging states to protect any "right" to counsel on collateral review by an alternative means and conclusively establishes the impracticality of *Anders'* routine and thoughtless extension. Even more importantly, this extension was constitutionally unnecessary; it misconstrued the scope of the right to counsel which *Anders* protects and elevated to con-

---

[12]*See, e.g., People* v. *Von Staich*, 101 Cal. App. 3d 172, 161 Cal. Rptr. 448 (1980) (*Anders* review involves "unconscionable amount of time which could be better spent on more productive judicial pursuits"); *State* v. *Horine*, 64 Or. App. 532, 669 P.2d 797, *review denied*, 296 Or. 237, 675 P.2d 490 (1983), *cert. dismissed*, 466 U.S. 934 (1984) (Oregon Court of Appeals extremely critical of *Anders* anomaly and almost universal interpretation of that case, whereby "an appellate court must search record for error when counsel has found none, but need not do so when counsel finds and argues one claim of error").

[13]The most extreme examples of this problem are found in the California cases where a number of non-*Anders* litigants have cited the equal protection clause in support of their claim for *Anders* review. *In re Edward S.*, 133 Cal. App. 3d 154, 183 Cal. Rptr. 733 (1982); *People* v. *Logan*, 131 Cal. App. 3d 575, 182 Cal. Rptr. 543 (1982); *People* v. *Johnson*, 123 Cal. App. 3d 106, 176 Cal. Rptr. 390 (1981), *cert. denied*, 457 U.S. 1108 (1982).

stitutional status a right without a federal constitutional basis.

Despite the state court's apparent contrary belief, *Anders* conferred no new right on the criminally accused. Rather, it articulated specific procedures for enforcing the newly recognized right to counsel on a first direct appeal as of right.[14] This right to counsel recognized by *Douglas* depended on both a due process and an equal protection

---

[14]There is no constitutional right to appeal a criminal conviction. *See Abney v. United States,* 431 U.S. 651 (1977); *McKane v. Durston,* 153 U.S. 684, 687-688 (1894). Congress provided for direct review of capital cases by this Court in 1889. This right was extended to other infamous crimes in 1891. *See Evitts v. Lucey,* 469 U.S. 387 (1985) (Rehnquist, J., now C.J., dissenting), citing *Carroll v. United States,* 354 U.S. 394, 400 n.9 (1957). The general right to appeal criminal convictions did not arise until 1911; in 1928, Congress eliminated discretionary review by writ of error and permitted the appeal of all federal convictions. *See* 3 Wayne R. LaFave & J. H. Israel, Criminal Procedure, § 261, p.172 n.5 (1984 & Supp. 1986).

Likewise, virtually all states permit direct appeals, as of right, from criminal convictions. Virginia and West Virginia, the exceptions, have devised closely equivalent procedures. In deciding whether to hear an appeal, the Virginia appellate court requires a three-judge panel to consider the record, briefs, and oral argument by the appellant. In West Virginia, a defendant is entitled to a petition for review and to present his petition at a ten-minute oral argument. *See* Dalton, *Taking the Right to Appeal (More or Less) Seriously,* 95 Yale L.J. 62 n.2 (1985). In addition, all fifty (50) states provide for collateral review. For a description of the post-conviction remedies available in the states, *see* Donald E. Wilkes, Jr., Federal and State Postconviction Remedies and Relief, at 231-260 (1983 & Supp. 1985) (Appendix A: a survey of current post-conviction remedies and relief in each of the fifty states and the District of Columbia); Larry W. Yackle, Postconviction Remedies, at 66-69 (1981 & Supp. 1986) (survey of jurisdictions). *Anders* extension to collateral proceedings would further burden those jurisdictions that choose to provide indigent defendants with counsel on collateral review.

analysis.[15] The Court noted, however, that "[a]bsolute equality is not required; lines can be and are drawn and we often sustain them." *Id.,* 372 U.S. at 357. This case is a case in which such a line must be drawn.

Because *Anders* depends on the underlying constitutionally-based *Douglas* right to counsel on a first appeal, its burdensome protections can be constitutionally required at subsequent proceedings only where there also exists a federal constitutional right to counsel. Collateral review is not such a proceeding.

This Court has explicitly stated that there is no right to counsel in pursuing state or federal discretionary appeals. *See Ross v. Moffitt,* 417 U.S. at 609; *Wainwright v. Torna,* 455 U.S. 586 (1982). There are not sufficient differences between discretionary and collateral review to warrant finding a right to counsel on collateral review. *See Bounds v. Smith,* 430 U.S. 817, 839, 840-841 (1977) (Rehnquist, J., now C.J., dissenting) (given the Court's holding in *Ross v. Moffitt* that there is no right to counsel on discretionary appeal, "[i]t would seem, *a fortiori,* to follow from that case that an incarcerated prisoner who has pursued all his avenues of direct review would have no constitutional right whatever to state appointed

---

[15]" 'Due process' emphasizes fairness between the State and the individual dealing with the State, regardless of how other individuals in the same situation may be treated. 'Equal protection,' on the other hand, emphasizes disparity in treatment by a State between classes of individuals whose situations are arguably indistinguishable." *Ross v. Moffitt,* 417 U.S. 600, 609 (1974).

Applying these concepts, the *Douglas* Court found that forcing an indigent to have his "one and only appeal" decided without counsel draws an "unconstitutional line" between rich and poor. Running a "gantlet of a preliminary showing of merit" did not, in the Court's opinion, "comport with fair procedure." *Id.,* 372 U.S. at 357.

counsel to represent him in a collateral attack on his conviction, and none of our cases has ever suggested that a prisoner would have such a right"). Indeed, there is no right to counsel for federal habeas corpus actions.[16] Nor is there a constitutional basis for requiring any more in state court than is required in federal court. *See Norris v. Wainwright,* 588 F.2d at 134. Thus, the lower federal courts have recognized that there is no constitutional right to counsel in state post-conviction or collateral proceedings.[17]

Even in the absence of a federal constitutional right, individual states may, of course, choose to grant a right to counsel on state collateral review. *See Ross v. Moffitt, supra.* Whether this is by way of a supervisory rule of court, as in Pennsylvania, Pa.R.Crim.P. 1503 and 1504, or as a matter of state constitutional law, *Anders* formal requirements should not apply. State-created rights are

---

[16]*See Johnson v. Avery,* 393 U.S. 483, 488 (1969) ("It has not been held that there is any general obligation of the courts, state or federal, to appoint counsel for prisoners who indicate, without more, that they wish to seek post-conviction relief."); *see also Harrington v. Holshouser,* 741 F.2d 66, 70 (4th Cir. 1984) (requirements of prison library); *Cepulonis v. Fair,* 732 F.2d 1, 6 (1st Cir. 1984); *Young v. Zant,* 727 F.2d 1489, 1493 (11th Cir. 1984), *cert. denied,* 105 S.Ct. 1371 (1985); *Norris v. Wainwright,* 588 F.2d 133 (5th Cir.), *cert. denied,* 444 U.S. 846 (1979); *Hopkins v. Anderson,* 507 F.2d 530, 533 (10th Cir. 1974), *cert. denied,* 421 U.S. 920 (1975); *Kreiling v. Field,* 431 F.2d 638, 640 (9th Cir. 1970).

[17]*See Dankert v. Wharton,* 733 F.2d 1537, 1538 (11th Cir.), *cert. denied,* 469 U.S. 1020 (1984); *Norris v. Wainwright,* 588 F.2d at 132. *See also Boyd v. Dutton,* 405 U.S. 1, 7 n.2 (1972) (Powell, J., dissenting) (no absolute right to counsel in state post-conviction proceedings); Yackel, Postconviction Remedies, § 137, p.519 ("There is, then, no blanket constitutional right to the assistance of counsel in collateral proceedings.").

best vindicated by the states themselves. The states should be free to experiment, and to decide what procedures can most meaningfully and fairly enforce state laws, without illogically and unnecessarily burdening them further.[18]

A contrary conclusion would allow *Anders* to be used to transform, from a non-constitutional to a federal constitutional basis, any provision for counsel on collateral review. That this Court's decisions do not require such a result is evidenced by *Bounds v. Smith,* which held that the provision and availability of law libraries was constitutionally adequate to insure incarcerated prisoners with meaningful access to the courts on collateral review.[19] Respondent here, of course, received even more; she received an attorney who, after scrupulously reviewing the record and discussing the case with her, found no arguably meritorious issue(s) to raise on her behalf. Although respondent had received more than she was entitled to,

---

[18]*See People v. Von Staich,* 101 Cal. App. 3d 172, 161 Cal. Rptr. 448 (1980) ("After the State Public Defender has said there are no arguable issues, our subsequent review in this case might be compared to touching up a Rembrandt, proofreading Shakespeare or editing a speech by Winston Churchill."). Indeed, as the three dissenters in *Anders* noted, the *Anders* procedures were premised on unwarranted distrust for the *in forma pauperis* bar. *See* 386 U.S. at 746-747 (Stewart, J., dissenting, joined by Black and Harlan, JJ.). While these procedures may be required for purposes of direct appeal, where there is a right to counsel protected by the federal constitution, there is absolutely no basis or need to extend *Anders* protections to collateral review proceedings.

[19]The Court specifically noted that while some states do provide prisoners with professional assistance in pursuing collateral claims, "adequate law libraries are one constitutionally acceptable method to assure meaningful access to the courts." *Bounds v. Smith,* 430 U.S. at 830.

see, Bounds v. Smith, the Pennsylvania Superior Court nevertheless illogically superimposed on those protections the additional protections of *Anders.*

A review of *Douglas,* upon which *Anders* depended, as well as the cases following, demonstrates the Superior Court's illogic. *Douglas* relied on both an equal protection and a due process analysis. Its equal protection analysis derived from *Griffin v. Illinois,* 351 U.S. 12 (1956) (indigent defendant must be provided with a free transcript). This analysis has been de-emphasized in recent cases, *see Bearden v. Georgia,* 461 U.S. 660, 664-667 and n.8 in particular (1983), which have made it clear that indigent defendants need not, in the name of equal protection, be provided with everything that a wealthy defendant is capable of purchasing. *See Ross v. Moffitt; Nickols v. Gagnon,* 454 F.2d at 472 (Stevens, J.) ("Every defendant does not have the constitutional right to be represented by Clarence Darrow. Perfect equality between indigents and non-indigents, or among members of the class of non-indigents itself, is impossible to achieve.") *cert. denied,* 408 U.S. 925 (1972); *Slawek v. United States,* 413 F.2d 957, 960 (8th Cir. 1969) (Blackmun, J.) (fact that rich defendants may waste money on unnecessary and foolish trial steps does not give the indigent the right to squander government funds).[20]

---

[20]Lawyers, of course, whether retained or court-appointed, have the identical ethical obligation not to pursue frivolous appeals. *See Polk County v. Dodson,* 454 U.S. 312, 323 (1981) ("Although a defense attorney has a duty to advance all colorable claims and defenses, the canons of professional ethics impose limits on permissible advocacy. It is the obligation of any lawyer—whether privately retained or publicly appointed—not to clog the courts with frivolous motions or appeals (footnote omitted)."); Standards for Criminal Justice, Standard 4-3.9 &

(Continued on following page)

Hence, this Court's resultant critical inquiry has been whether indigent defendants have lacked meaningful access to the courts, and, therefore, been deprived of due process. "[W]hile the Court has not held that a State must purchase for the indigent defendant all the assistance that his wealthier counterpart might buy . . . it has often reaffirmed that fundamental fairness entitles indigent defendants 'to an adequate opportunity to present their claims fairly within the adversary system.' " *Ake v. Oklahoma,* 470 U.S. 68 (1985), citing *Ross v. Moffitt,* 417 U.S. at 612. The equal protection analysis thus collapses into the due process analysis. *See Bearden v. Georgia,* 461 U.S. at 665-666.[21]

(Continued from previous page)

commentary (1980). Every lawyer also has the same duty to counsel his client regarding the issues and probability of success on appeal. *See* Standards for Criminal Justice, Standard 21-2.2 (1980).

A non-indigent defendant whose retained counsel has advised him that an appeal will almost certainly be denied has a financial incentive to save his money and abandon the appeal. Since the indigent, however, has nothing to lose, he is far less inclined to forego any "right" conferred upon him by the state. This is reverse equal protection; it risks widespread deleterious effects. "With nothing to lose, impecunious defendants may be exercising the right to appeal imprudently and without much forethought . . . In the opinion of some careful students of appellate justice, this nothing-to-lose position of indigent defendants could cause an erosion of appellate process that would result in less adequate justice for all appellants, especially those who have substantial questions to raise for determination by appellate courts (footnote omitted)." Standard 21-2.3 and commentary. While this result may be required to protect defendant's *Douglas* rights, there is no reason to give frivolous collateral proceedings the same constitutionally-protected status.

[21]"To determine whether this differential treatment violates the Equal Protection Clause, one must determine whether, and under what circumstances, a defendant's indigent status may be considered in the decision whether to revoke probation. This

(Continued on following page)

Meaningful access and fundamental fairness are due process concepts. Protection must be equal only to the extent necessary to insure the meaningful access required by due process.[22]

Respondent cannot seriously contend that she has been denied "meaningful access" to the courts in seeking collateral review of her murder conviction. Since filing her *pro se* Post Conviction Hearing Act petition, respondent has been given three (3) free attorneys, and her case has twice been before the state appellate courts. To superimpose *Anders* protections upon this litany of "rights" would demean the legal profession.[23] Moreover, it would sanction a constitutionally unnecessary litigious merry-go-round.

While this "Court has long been sensitive to the treatment of indigents in our criminal justice system," the Court

---

(Continued from previous page)

is substantially similar to asking directly the due process question of whether and when it is fundamentally unfair or arbitrary for the state to revoke probation when an indigent is unable to pay the fine." *Id.*

[22]*See, e.g., Burns v. Ohio,* 360 U.S. 252 (1959) (an indigent defendant may not be required to pay filing fees); *Mayer v. City of Chicago,* 404 U.S. 189 (1971) (an indigent defendant must be provided with a free transcript although he must make out a colorable showing of need if he wishes to receive a complete verbatim transcript); *Karabin v. Petsock,* 758 F.2d 966, 969 (3d Cir.), *cert. denied,* 106 S.Ct. 163 (1985) (same); *Byrd v. Wainwright,* 722 F.2d 716 (11th Cir.), *cert. denied,* 469 U.S. 869 (1984) (a transcript must be provided even for a discretionary appeal).

[23]This Court has recognized that there are contexts in which it is appropriate to defer to the judgment of appointed counsel. *See Jones v. Barnes,* 463 U.S. 745, 754 (1983) (appointed appellate counsel is not constitutionally required to press every nonfrivolous point requested by the client; advocate's role, as recognized by *Anders,* is to support the client "to the best of his ability"). The situation here presented likewise warrants deference to appointed counsel's judgment.

has nevertheless "recognized limits on the principle of protecting indigents in the criminal justice system." *Bearden v. Georgia,* 461 U.S. 660, 664 (1983). That limit was here properly recognized by the post-conviction hearing court judge who declined rotely to apply *Anders* and instead accepted defense counsel's well-considered "no-merit" letter. This Court must reinstate that decision and hold *Anders* inapplicable to collateral review proceedings.

CONCLUSION

For the foregoing reasons, it is respectfully requested that the order of the Pennsylvania Superior Court be reversed and the case remanded for further proceedings consistent with this Court's opinion.

Respectfully submitted,

GAELE MCLAUGHLIN BARTHOLD*
Deputy District Attorney
ANN C. LEBOWITZ
Assistant District Attorney
LAURIE MAGID
Assistant District Attorney
HUGH J. BURNS, JR.
Assistant District Attorney
RONALD EISENBERG
Chief, Appeals Unit
WILLIAM G. CHADWICK, JR.
First Assistant District Attorney
RONALD D. CASTILLE
District Attorney

*Counsel of Record

OFFICE OF THE DISTRICT ATTORNEY
1300 Chestnut Street
Philadelphia, Pennsylvania 19107
Telephone: (215) 875-6010
November 25, 1986

APPENDIX A

Pa.R.Crim.P. 1503 and 1504, Relating to Post-Conviction Proceedings, and Accompanying Notes

RULE 1503. APPOINTMENT OF COUNSEL.

(a) Except as provided in Rule 1504, when an unrepresented petitioner satisfies the court that he is unable to procure counsel, the court shall appoint counsel to represent him. The court, on its own motion, shall appoint counsel to represent a petitioner whenever the interests of justice require it.

(b) Where counsel has been appointed, such appointment shall be effective until final judgment, including any proceedings upon appeal from a denial of collateral relief.

*NOTE: Adopted January 24, 1968, effective August 1, 1968; rescinded December 11, 1981, effective June 27, 1982; recission vacated June 4, 1982.

RULE 1504. SUMMARY DISPOSITIONS.

Appointment of counsel shall not be necessary and petitions may be disposed of summarily when a previous petition involving the same issue or issues has been finally determined adversely to the petitioner and he either was afforded the opportunity to have counsel appointed or was represented by counsel in proceedings thereon.

*NOTE: Adopted January 24, 1968, effective August 1, 1968; rescinded December 11, 1981, effective June 27, 1982; recission vacated June 4, 1982.

No. 85-2099

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

COMMONWEALTH OF PENNSYLVANIA,
Petitioner,

v.

DOROTHY FINLEY,
Respondent.

On Writ Of Certiorari To The Superior Court Of Pennsylvania

BRIEF FOR RESPONDENT

CATHERINE M. HARPER
(Appointed by this Court)
HAMBURG, RUBIN, MULLIN
& MAXWELL
800 East Main Street
Lansdale, PA 19446
Telephone: (215) 368-3600

30pp

COUNTERSTATEMENT OF QUESTIONS PRESENDED

1. Where state law provides indigent prisoners with court-appointed attorneys to aid them in pursuing collateral review of their convictions, does *Anders* v. *California*, 386 U.S. 738 (1967) apply to attorneys who seek leave to withdraw?

2. Since Pennsylvania has chosen to provide indigent prisoners with attorneys to aid them in the formulation, presentation and prosecution of petitions under the Post-Conviction Hearing Act, 42 Pa. Cons. Stat. Ann. section 9541 *et seq.* (Purdon 1982) (hereinafter, PCHA), do the Due Process and Equal Protection clauses of the Fourteenth Amendment require effective counsel who will act as advocates for their clients?

3. Did the procedure utilized in the case at bar, which required court-appointed counsel to brief the case against his client, deny the indigent prisoner meaningful access to the courts, thereby offending traditional notions of Due Process and Equal Protection of the laws?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Table of Authorities Continued

COUNTERSTATEMENT OF THE CASE

The Commonwealth of Pennsylvania sought a Writ of Certiorari to this Court after the Pennsylvania Supreme Court, the highest court in the Commonwealth of Pennsylvania, dismissed the Commonwealth's prior appeal as "having been improvidently granted," after full briefing and argument, and reinstated the able and well reasoned order and opinion of the Pennsylvania Superior Court. *Commonwealth* v. *Finley*, 330 Pa. Super. Ct. 313, 479 A.2d 568 (1984), *App. Dismd.*, 507 A.2d 822 (Pa. 1986) (J.A. 18-27).

The Pennsylvania Superior Court held that court-appointed counsel who seeks to withdraw from the representation of an indigent prisoner in a case brought under Pennsylvania's collateral review statute must follow the dictates of *Anders* v. *California*, 386 U.S. 738, 18 L.Ed. 2d 493, 87 S.Ct. 1396 (1967), *rehearing denied*, 388 U.S. 924, 18 L.Ed. 2d 1377, 87 S.Ct. 2094. Because Dorothy Finley's court-appointed counsel not only failed to satisfy the requirements of *Anders* v. *California*, *supra*, but actually briefed the case against his client by filing a "no merit" letter to the Court, the Pennsylvania Superior Court concluded that the case had to be remanded to the lower court "for an evidentiary hearing on the claims raised in (respondent's) brief and any other issues discerned by counsel after an exhaustive search of the record in accordance with this opinion." (J.A. 27). The Superior Court specifically found that the procedure utilized by counsel was "defective," in that it "acted to deprive (respondent) of her right to adequate representation." (J.A. 27).

Dorothy Finley's underlying conviction resulted from a non-jury trial on October 17, 1975, when she was convicted of robbery, criminal conspiracy, weapons offenses,

and second-degree murder.[1] On the murder charge, Dorothy Finley was sentenced to life imprisonment; various sentences were meted out with respect to the other charges and Mrs. Finley, now 54 years old, has been incarcerated at Pennsylvania's State Correctional Institution for Women at Muncy, since 1975.

Mrs. Finley was represented at trial by a court-appointed attorney who also took the direct appeal from her convictions to the Pennsylvania Supreme Court, where all of the sentences and convictions were affirmed in a *per curiam* opinion approximately one page in length

[1] The Commonwealth's brief has a lurid version of the "facts" adduced at trial which respondent disputes. However since a recitation of the facts concerning the crimes charged is not germane to the issue before this Court, respondent will not clutter the record with argument on that score. Suffice it to say that the shooter, identified only as "Red Dude" by the Commonwealth's principle witness Garfield Hedgman, was never arrested or brought to trial. The conviction of Tyrone Finley, who allegedly drove the "get away car" was reversed by The Pennsylvannia Supreme Court at *Commonwealth* v. *Finley*, 477 Pa. 382, 383 A.2d 1259 (1978) for insufficient evidence. His conviction, like that of respondent, depended heavily on the testimony of Hedgman whose admitted presence at the scene was to purchase drugs from the victim, and who pleaded guilty to the victim's robbery and was rewarded with the District Attorney's recommendation that he be sentenced to two years' probation in exchange for his testimony in the two Finley trials. (N.T. 10/15/75, 21-22). The victim's girlfriend, the only other eyewitness, Bernadette Durant, could not identify any of the intruders and testified that she had never seen Dorothy Finley before the trial. (N.T. 10/15/75, 59-62). Interestingly, Hedgman identified the shooter only as "Skeets" at Tyrone Finley's trial, and called the shooter "Fred" in his statement to the police. Despite Hedgman's cooperation with the prosecution, this individual was not apprehended. Mrs. Finley's defense was that she was not present at all at the scene of the crime and she offered testimony of her doctor and pharmacist to substantiate her whereabouts on the afternoon in question.

at *Commonwealth of Pennsylvania* v. *Dorothy Finley*, 477 Pa. 211, 383 A.2d 898 (1978).

According to the Opinion, two issues only had been raised on Mrs. Finley's behalf: (1) there was allegedly insufficient evidence to support any of the convictions for the crimes charged, and (2) a search warrant was based on illegally obtained evidence and therefore, the evidence obtained pursuant to that warrant was inadmissible. After identifying those issues, the Supreme Court concluded: "Having found no merit in either of these arguments, we affirm the judgments of sentence." Thereafter, Mrs. Finley filed a *pro se* petition for relief under the Pennsylvania Post-Conviction Hearing Act, 42 Pa. Cons. Stat. Ann. 9541 *et seq*. (Purdon 1982) (Previously 19 P.S. 1180-1 *et seq*..) (Purdon 1966). Her uncounseled petition merely repeated the allegations raised by her trial counsel in the direct appeal to the Supreme Court. Although Mrs. Finley averred that she was indigent and requested the appointment of a lawyer, the PCHA petition was denied by the Court of Common Pleas in Philadelphia without the appointment of counsel. The Court held: "The allegations raised in the instant petition must be deemed to have been fully litigated." Later, the Pennsylvania Supreme Court reversed that determination, vacated the Order denying relief, and remanded the case to the PCHA court with instructions that counsel be appointed for Mrs. Finley. (J.A. 6) *Commonwealth* v. *Dorothy Finley*, 479 Pa. 332, 440 A.2d 1183 (1981), *reargument denied*.

The Pennsylvania Supreme Court explicitly ruled that: an indigent petitioner had the right to assistance of counsel with her first PCHA petition. (J.A. 7) The ruling rests on both the Post-Conviction Hearing Act and the Pennsylvania Rules of Criminal Procedure. The Pennsylvania

Supreme Court sagely noted that: "Counsel for PCHA petitioner can more ably explore legal grounds for complaint, investigate underlying facts, articulate claims for relief, and promote efficient administration of justice." (J.A. 8) *Commonwealth* v. *Finley, Id.* at 335.

Thereafter, in compliance with the Order of the Pennsylvania Supreme Court, counsel was appointed for Mrs. Finley on her PCHA petition. However, that court-appointed attorney did not fulfill the role envisioned for him by the Pennsylvania Supreme Court in remanding the case. The attorney did not file an amended PCHA petition; he did not file a brief in support of the issues raised in the uncounseled PCHA petition, or on any other issue. Instead, Mrs. Finley's court-appointed counsel "concluded that no arguably meritorious issues existed" and "sought advice from (the PCHA) court." (J.A. 13)

The PCHA Court thereafter instructed court-appointed counsel that he might withdraw his appearance if he followed the following procedure, ultimately found defective by the Pennsylvania Superior Court:

> Counsel was instructed that where he had completed a comprehensive review of the entire record and the applicable law, and has interviewed the defendant and concluded that the record was devoid of arguably meritorious contentions, counsel should write this court in letter form detailing not only the nature and extent of his review, but also listing each issue the defendant herself wished to have raised, followed by an explanation why those issues were meritless. At that point, this Court would conduct its own independent review and, if our conclusions coincide with counsel's, the Petition would be dismissed without a hearing and defendant would be apprised of her appellate rights. (J.A. 13-14).

PCHA counsel followed the procedure suggested to him by the Court, instead of the procedure outlined in

Anders v. *California, supra,* and wrote a letter to the Court "explaining" why Mrs. Finley's PCHA Petition would be "meritless." (J.A. 9) Not surprisingly, the PCHA Court dismissed petition without a hearing and the attorney was relieved of his appointment.

PCHA counsel never wrote a brief setting forth issues of arguable merit, and, apparently, never notified the indigent criminal defendant of his intentions or of her right to proceed *pro se* or to obtain new counsel. After the Court dismissed the petition without a hearing, undersigned counsel was appointed to pursue an appeal to the Pennsylvania Superior Court.

The Pennsylvania Superior Court concluded that the procedure suggested by the PCHA Court was defective because it had the effect of depriving Mrs. Finley of her right to adequate representation on her PCHA Petition. (J.A. 18-27).

The Pennsylvania Superior Court's Opinion in *Commonwealth* v. *Dorothy Finley,* 330 Pa. Super. 313, 479 A.2d 568 (1984) (J.A. 18-27), first noted that the requirements outlined by this Court in *Anders* v. *California, supra,* are applicable where counsel appointed to represent an indigent defendant in a collateral review proceeding wishes to withdraw from the case on the ground that an appeal would be frivolous. (J.A. 21-22) The Court traced the history of the progeny of *Anders* v. *California* in the Pennsylvania courts, and noted that *Anders* applied to direct appeal cases, and thereafter concluded that it should also apply to an indigent criminal defendant's first petition under the Post-Conviction Hearing Act, a collateral review statute. Key to the Superior Court's reasoning in this case was the prior decision by the Pennsylvania Supreme Court that Dorothy Finley was entitled to

court-appointed counsel on her first PCHA petition. The Superior Court astutely noted: "The Supreme Court wished to afford appellant the opportunity to amass other issues with arguable merit . . . moreover, Pennsylvania Rule of Criminal Procedure 1504, in affording counsel, means that counsel should act as an advocate in fulfilling his role." (J.A. 24) The Court declined to make its own exhaustive search of the record without benefit of an advocate's review of the record and resulting brief, noting that the Supreme Court had mandated that counsel be appointed to assist Dorothy Finley on her PCHA petition. "This remand carries with it a strengthening obligation to assess the quality of appellant's case in an arena wherein she is accompanied by a zealous advocate." (J.A. 26)

Additonally, the Pennsylvania Superior Court concluded that the procedure followed by PCHA counsel was defective in that counsel's "no merit letter" was insufficient in light of the fact that there appeared to be arguably meritorious issues, and counsel's review of the record was not evident. The Court also noted that PCHA court-appointed counsel had failed to comply with the *Anders* requirement that the indigent herself be informed of counsel's decision, and that she be given the opportunity to proceed *pro se*.

For the above reasons, the Superior Court endorsed the view that counsel seeking to withdraw from a court appointment to represent an indigent criminal defendant on a PCHA petition must comply with the requirements of *Anders* v. *California*, *supra*. The *Anders* requirements were restated by the Court as follows:

> If the attorney, after a conscientious evaluation of the record, finds his case to be 'wholly frivolous,' he may so advise the court and request permission to withdraw. He must, however, accompany his request with a brief referring to anything in the record which will 'arguably' support an appeal. A copy of that brief should then be furnished to the indigent within enough time to allow the latter to pursue an appeal, either counseled or *pro se*. The *court* after a full examination of the record then decides whether the case is wholly frivolous; and if it so finds, it may grant counsel's request to withdraw. (J.A. 21) (emphasis in original)

The Pennsylvania Superior Court then remanded the case to the Court of Common Pleas of Philadelphia County for an evidentiary hearing on any issues discerned by counsel after "an exhaustive search of the record in accordance with this opinion." (J.A. 27)

Thereafter, the Commonwealth sought review of the Superior Court decision in the Pennsylvania Supreme Court by *allocatur*. *Allocatur* was granted, and the matter was briefed and argued before the Pennsylvania Supreme Court. On April 23, 1986, in a *per curiam* Opinion, the Pennsylvania Supreme Court simply ordered that the Appeal be dismissed "as having been improvidently granted." (J.A. 28). The Commonwealth then sought review of the Superior Court decision by this court. *Certiorari* was granted October 6, 1986.

SUMMARY OF ARGUMENT

Pennsylvania has chosen to provide counsel to indigent prisoners seeking the review of their criminal convictions under Pennsylvania Post-Conviction Hearing Act, *supra*. For that reason, the Pennsylvania Superior Court concluded that the procedure outlined by this Court in *Anders* v. *California*, 386 U.S. 738 (1967), should apply to court-appointed counsel seeking leave to withdraw from cases arising under the Act. Additionally, the Superior Court specifically concluded that the procedure actually

followed in the case at bar not only differed from that prescribed in *Anders*, *supra*, but was itself defective since counsel failed to file a brief referring to any issues of arguable merit in the record; failed to demonstrate an exhaustive reading of the record and failed to inform the client of his intention to withdraw from her case in sufficient time for her to prepare to proceed *pro se* with her PCHA Petition.

Instead, the court-sanctioned "no merit letter" not only deprived Dorothy Finley of her state created right to the effective assistance of counsel for her PCHA Petition but forced her to contend with the grim reality that her own court-appointed lawyer had briefed the case against her.

When a state creates procedures for finally determining guilt or innocence and chooses to provide counsel to persons too poor to retain their own attorneys, the state must insure that the court procedures it uses comport with the demands of the Due Process and Equal Protection clauses of the Fourteenth Amendment to the United States Constitution. *Evitts* v. *Lucey*, 469 U.S. 387, 105 S.Ct. 830, 83 L.Ed. 2d 821 (1985), *pet. for reh. denied*, citing *Griffin* v. *Illinois*, 351 U.S. 12, 18, 100 L.Ed 891, 76 S.Ct. 505 (1956). The "no merit letter" used in this case required court-appointed counsel to become an adversary to his own client, arguing for the petition's dismissal, and failed to insure that the indigent prisoner's concerns and contentions were brought effectively to the court's attention. Thus, the procedure sanctioned by the Philadelphia Court of Common Pleas failed to satisfy the dictates of Due Process and Equal Protection because it denied Dorothy Finley, an indigent prisoner, meaningful access to the courts to vindicate her state created right to have her conviction reviewed by the court, informed of the issues by an effective advocate acting on her behalf. In the

alternative, it is argued that the states are free to provide their citizens with broader rights than those guaranteed by the United States Constitution. Pennsylvania has freely chosen to adopt the *Anders* three-pronged scheme as a requirement for counsel seeking leave to withdraw from the representation of an indigent prisoner as the most effective solution to a thorny jurisprudential problem. It is not necessary for this court to determine that *Anders* is Constitutionally required to defer to the Pennsylvania Superior Court's decision in this regard. Since Pennsylvania may lawfully require court-appointed attorneys in collateral review cases to adhere to the *Anders* requirements as a matter of state law, this court may well decide that *certiorari* was improvidently granted in this case, and that the case should be remanded to the Philadelphia Court of Common Pleas in accordance with the opinion of the Pennsylvania Superior Court.

ARGUMENT

A. Since Pennsylvania Has Freely Chosen To Provide Counsel To Indigent Prisoners Seeking Collatera! Review Of Their Convictions, Due Process Requires That Attorneys Who Withdraw From Representation Follow The Procedure Outlining In *Anders* v.*California*, 386 U.S. 738 (1967).

The Commonwealth of Pennsylvania provides prisoners with a right to petition the courts for collateral review of their criminal convictions under the Post-Conviction Hearing Act (42 Pa. Cons. Stat. Ann. Section 9541 *et seq*. (Purdon 1982), hereinafter referred to as PCHA). Indigent PCHA Petitioners are entitled to the appointment of counsel for their first PCHA Petition under sec-

tion 9551 of the Act.[2] Counsel is also provided under the Pennsylvania Rule of Criminal Procedure for indigent petitioners.[3] Additionally, the Pennsylvania Courts have interpreted the PCHA (and its predecessor statute now repealed but previously found at Pa. Stat. Ann. Tit. 19 Section 1180-1 *et seq.*) (Purdon 1966) as requiring counsel on a first PCHA Petition. *Commonwealth* v. *McClinton*, 488 Pa. 598, 413 A.2d 386 (1980). The requirement that counsel be appointed to represent the indigent on her first PCHA Petition is applied even where the petition (generally drawn *pro se)* fails to raise new issues, because, "Counsel for a PCHA petitioner can more ably explore legal grounds for a complaint, investigate underlying facts, articulate claims for relief and promote efficient administration of justice." *Commonwealth* v. *Finley*, 497 Pa. 332, 440 A.2d 1183 (1981), reproduced, (J.A. 6-8), because it was an earlier proceeding in the case at bar. See

[2] 42 Pa. Cons. Stat. Ann. Section 9551 (B) Appointment of Counsel: "If the petitioner is without counsel and alleges he is without means to procure counsel, he shall state whether or not he wishes counsel to be appointed to represent him. If appointment of counsel is so requested and the court is of the opinion that a hearing on the Petition is required, the court shall appoint counsel if satisfied that the petitioner has no means to procure counsel. The appointment of counsel shall not be required if petitioner's claim is patently frivolous and without trace of support in the record as provided by Section 9549 (relating to hearing on petition)."

[3] Pa.R.Crim.P. Section 1503 (A): "Except as provided in Rule 1504, when an unrepresented petitioner satisfies the court that he is unable to procure counsel, the court shall appoint counsel to represent him. The court, on its own motion, shall appoint counsel to represent a petitioner whenever the interests of justice require it." Rule 1504 provides that the appointment of counsel is not necessary "when a previous petition involving the same issue or issues has been finally determined adversely to the petitioner and he was either afforded the opportunity to have counsel appointed or was represented by counsel in proceedings thereon."

also *Commonwealth* v. *McClinton*, *supra*, and cases cited therein.[4]

The requirement that counsel be afforded to an indigent PCHA Petitioner does not rest on the Sixth Amendment right to counsel found in the United States Constitution.[5]

[4] *Commonwealth* v. *Blair*, 460 Pa. 31, 331 A.2d 213 (1975); *Commonwealth* v. *Mitchell*, 427 Pa. 395, 235 A.2d 148 (1967); *Commonwealth* v. *Richardson*, 426 Pa. 419, 233, A.2d 183 (1967); *Commonwealth* v. *Hoffman*, 426 Pa. 226, 232, A.2d 623 (1967); and *Commonwealth* v. *Fiero*, 462 Pa. 409, 341, A.2d 448 (1975).

[5] An argument can be made that appointing counsel to represent indigent petitioners seeking collateral review of their criminal convictions is constitutionally compelled under the Sixth and Fourteenth Amendments to the United States Constitution, as the logical development of the law in this area following *Griffin* v. *Illinois*, 351 U.S. 12, 76 S.Ct. 585, 100 L.Ed. 891 (1956), *Gideon* v. *Wainwright*, 372 U.S. 335, 9L.ed. 2d 799, 83 S.Ct. 792 (1963) and *Douglas* v. *California*, 372, U.S. 353, 9L.ed. 2d 811, 83 S.Ct. 814, *reh. den.* 373 U.S. 905, 10 L.Ed. 2d 200, 83 S.Ct. 1288 (1963). However, it is not necessary to find that the right to counsel is a Constitutional right in order to decide the case at bar. Moreover, *Ross* v. *Moffitt*, 417 U.S. 600, 1 L.Ed. 2d 341, (1974), would not compel the contrary result, since *Ross* v. *Moffitt*, *supra*, held that an indigent prisoner was not entitled to court-appointed counsel for a discretionary appeal to the highest state court, where the issues sought to be brought to the court's attention had previously been the subject of a brief prepared by court-appointed counsel, and the prisoner could supplement that brief with his own contentions in seeking review by the state's highest court. Thus it was felt that the petitioner in *Ross* v. *Moffitt* was not denied meaningful access to the courts because of the assistance available to him from the record, briefs and opinions of the lower court where he was assisted by counsel. *See* discussion of *Ross* v. *Moffitt*, *supra*, in *Evitts* v. *Lucey*, *supra*, 83 L.Ed. 2d at 833. By contrast, a petitioner seeking collateral review of her conviction does not have the benefit of an attorney's review of the record and briefing of the issues that she seeks to raise, because the collateral review process involves issues that have not previously been litigated or argued on the direct appeal. Therefore, *Ross* v. *Moffitt*, *supra*, can be distinguished from the present case.

In *Commonwealth* v. *McClinton, supra,* the Pennsylvania Supreme Court reiterated the reasons for appointing counsel to represent indigent petitioners on their first PCHA applications. Citing a prior opinion of the court, as well as the American Bar Association project on Minimum Standards for Criminal Justice, Standards Relating to Post-conviction Remedies (approved draft 1968), the Pennsylvania Supreme Court pointed out

> We pause to note that the mandatory appointment requirement is a salutary one and best comports with efficient judicial administration and serious consideration of a prisoner's claims. Counsel's ability to frame the issues in a legally meaningful fashion insures the trial court that all relevant considerations will be brought to its attention. (cites omitted). . . . It is a waste of valuable judicial manpower and an inefficient method of seriously treating the substantive merits of applications for post-conviction relief to proceed without counsel for the applicants who have filed pro se. . . . Exploration of the legal grounds for complaint, investigation of the underlying facts, and more articulate statement of claims are functions of advocate that are inappropriate for a judge or his staff. *Commonwealth* v. *McClinton, supra,* at 600, quoting *Commonwealth* v. *Mitchell, supra* at 148.

Pennsylvania's requirement that counsel be appointed carries with it the requirement that counsel so appointed discharge his duties as a zealous advocate. *Commonwealth* v. *Fiero, supra* at 413, *Commonwealth* v. *Ollie,* 304 Pa. Super. 505, 450 A.2d 1026 (1982). Therefore, where counsel failed to file an amended PCHA Petition (the first having been drawn *pro se*), failed to file a brief, failed to seek an extension of time, and failed to seek a hearing, the Pennsylvania courts have held that the petition was, in actuality, "uncounseled," and that new counsel should be afforded to the petitioner. *Commonwealth* v. *Ollie, Id.* at 510. See also *Commonwealth* v. *Fiero, supra* at 413.

Having determined that a PCHA petitioner is entitled to court-appointed counsel, the Pennsylvania Superior court determined that counsel who seeks to withdraw from such an appointment must comply with the trio of requirements outlined in *Anders* v. *California, supra,* first enunciated in *Commonwealth* v. *Baker,* 429 Pa. 209, 239, A.2d 201 (1968) for cases involving direct appeals in the Commonwealth.

Once a state has determined that counsel should be appointed, there is no logical reason to distinguish between the proper procedures to be followed when counsel seeks to withdraw from representation of an indigent in a direct appeal case, and when counsel seeks to withdraw from representation of an indigent in a PCHA case. If a petitioner has the right to counsel at all, that right must carry with it the right to effective counsel, and following proper procedures that comport with Due Process in order to withdraw is an essential component of that effective representation.

In *Commonwealth* v. *Baker, supra,* the Pennsylvania Supreme Court acknowledged that "even the most diligent court-appointed counsel may sometimes justifiably believe that he is being asked to pursue an appeal totally devoid of merit." *Id.* at 211. The *Baker* Court then restated the *Anders* requirements as follows:

> *Anders* gives to counsel two choices when representing an indigent client on appeal. He may, of course, file briefs and argue the case. But *Anders* emphasizes throughout the court's opinion, that the brief must be that an advocate, not an *amicus curiae*. 386 U.S. at 741, 87 S.Ct. at 1398-99. Or counsel may choose to withdraw his services, in which case this

> procedure must be followed: "If counsel finds his (the client's) case to be wholly frivolous, after a conscientious examination of it, he should so advise the court and request permission to withdraw. That request must, however, be accompanied by a brief referring to anything in the record that might arguably support the appeal. A copy of counsel's brief should be furnished to the indigent and time allowed him to raise any points that he chooses. . . ." 386 U.S. at 744, 87 S.Ct. at 1400. *Commonwealth* v. *Baker, Id.* at 211-212.

Moreover, the *Baker* court found that the third requirement of the *Anders* formula, that the client be advised of the attorney's decision to abandon the case, to be "indeed the most important requirement." *Commonwealth* v. *Baker, supra* at 214. "*Anders* clearly demands not only that the indigent be advised of his lawyer's decision to abandon the appeal, but also that the client be given a copy of counsel's brief *in time to present the appeal in propria persona*. Surely, were it not for this last requirement, all the *Anders* requirements would result in mere fodder for the file drawer." (Emphasis in original) *Commonwealth* v. *Baker, supra* at 214.

The procedure followed in the case at bar is woefully deficient when compared with that of *Anders* v. *California, supra*. In writing a "no merit" letter, court-appointed counsel's representation became less "a warm body at the petitioner's side,"[6] which, indeed would not have sufficed, but became, instead, "an assistant to the prosecutor" in seeing that the conviction remained virtually unchallenged. The procedure followed in this case was defective because:

(1) Court-appointed counsel was forced to brief the case against his own client;

[6] See Berger, *The Supreme Court And Defense Counsel: Old Roads, New Paths—A Dead End?* 86 Columbia L.R. 9 (1986).

(2) Court-appointed counsel failed to provide the PCHA petitioner with advance notice of his intentions or a copy of the "no merit" letter that he intended to send to the court; and

(3) The petitioner was not notified of her right to proceed *pro se* or to seek to have other counsel appointed to have her contentions heard.

Additionally, the Superior Court noted that the record is devoid of any attempt by the court-appointed attorney to make an exhaustive review of the record in an attempt to glean issues of arguable merit which could be marshalled to support the petitioner's attack on her conviction. Thus, the Pennsylvania Superior Court declined to review the record without benefit of an advocate's brief, and instead remanded the case for an evidentiary hearing on the claims raised in Dorothy Finley's brief,[7] and "any other

[7] It is not appropriate at this point to speculate on the possible merits of Dorothy Finley's petition, however, in reviewing the record available to the undersigned counsel, the following issues of arguable merit appear and there may certainly be other matters in the record which could, in the hands of a competent and skilled advocate, result in a new trial for the indigent petitioner. For example, there are some questions apparent in the record as to Dorothy Finley's Waiver of a Jury Trial; as to the propriety of Judge Armand Della Porta's refusal to permit certain testimony concerning a package placed in her apartment (which eventually yielded the gun identified as the murder weapon), by a Commonwealth witness never brought to trial (See N.T. 10-15-75, 97-99, 137-141); in the issues raised by trial counsel in his motion to suppress physical evidence (the gun later identified as the murder weapon), since it is not clear that the argument was made that the physical evidence was "the fruit of the poison tree" of an illegal arrest of Dorothy Finley and since this particular motion was hastily made on the day of the trial having been overlooked by counsel at the prior suppression hearing; counsel ineffectiveness at trial; and the possibility that the court's failure to "merge" the convictions relating to criminal conspiracy, robbery and murder was improper.

issues discerned by counsel after an exhaustive search of the record in accordance with this opinion." (J.A. 27) The respondent's present counsel, after some review of the record and discussions with Mrs. Finley, has spotted several issues that are entitled to an evidentiary hearing with their object a request for a new trial for the respondent.

The Commonwealth's Brief has characterized the *Anders* requirements as "confused," and has argued that the extension of *Anders* v. *California* to collateral review proceedings, even where state law provides appointed counsel for indigents, is "impractical, unwise, and constitutionally unnecessary." (Petitioner's Brief pg. 12). On the contrary, however, the *Anders* scheme has the advantage of assuring the indigent prisoner that her concerns will be heard by a court informed by an advocate acting on her behalf. When contrasted with the procedure actually used in the case at bar, *Anders* v. *California* can be seen to provide a workable alternative to what is admittedly a difficult jurisprudential problem, that of court-appointed counsel's inability to advocate effectively a cause he doesn't believe in.

In effect, the "no merit letter" requires court-appointed counsel to file a brief against his own client. "It is one thing for a prisoner to be told that appointed counsel sees no way to help him, and quite another for him to feel sandbagged when counsel appointed by one arm of the government seems to be helping another to seal his doom."

Additionally, Dorothy Finley herself has requested that the court review the sufficiency of the evidence with a view towards lessening the degree of murder for which she was ultimately convinced, as well as the fact that the victim's wife, one of two eye-witnesses to the crime, failed to identify her as a participant in the crime, and in fact suggested that she was not involved (N.T. 10-15-75 59-62).

Suggs v. *United States*, 391, F.2d 971, 974 (D.C. Cir. 1968). The danger of the "no merit letter" is that the indigent prisoner is in a far worse position than she would have been had her court-appointed counsel simply petitioned to withdraw, because the "no merit letter" requires counsel to marshall the arguments against his client in support of his view that her petition is frivolous, encouraging him to advocate the dismissal of the petition rather than to present an advocate's view of the contentions on her behalf. Moreover, the procedure fails to provide the indigent prisoner with the means or opportunity to present to the court her own *pro se* arguments and instead virtually assures the result that occurred in the instant case, that the PCHA Petition is dismissed.[8]

The need for an advocate to critically review the record, devise arguments, and state them persuasively for the court can not be overstated. Exploration of the legal grounds for a petition, investigation of the necessary underlying facts, and articulating the petitioner's concerns are the functions of an advocate, and are inappropriate for a judge or his staff, in our adversary system.

The concerns that gave birth to *Anders* v. *California*, are as real today, in the collateral review arena, as they were when this Court decided *Anders*. This procedure will assure penniless defendants the same rights and opportunities (where a state provides a collateral review

---

[8] Additionally, the "no merit letter" procedure, in conjunction with the Pennsylvania Rules of Criminal Procedure will actually deprive affected petitioners of the chance for a hearing on the merits of any issue identified as frivolous in the letter since the court will doubtless accept counsel's assessment and Rule 1504 provides that counsel need not be appointed on any subsequent petition where an issue has been determined adversely to a petitioner with counsel on a prior petition. See text Footnote 3, supra.

procedure)—as nearly as practicable—as are enjoyed by those persons who are in a similar situation but who are able to afford the retention of private counsel. *Anders* v. *California*, *supra*, at 145.

The sound jurisprudential reasons for requiring that counsel file an advocate's brief, and that counsel refrain from the "no merit letter" procedure do not change in the collateral review context. Though *Anders* v. *California* arguably depended upon a Sixth Amendment right to counsel, and the case *sub judice* involves a state created right to counsel, once effective, the right to counsel carries with it the right to effective representation, and there is no logical reason for distinguishing between a Sixth Amendment right to counsel which would require *Anders* v. *California* safeguards be applied, and a state created right to counsel for indigent petitioners that is similarly entitled to protection under the Due Process and Equal Protection clauses of the Fourteenth Amendment.

Although, for example, there is no Constitutional right to appeal a conviction, this court has repeatedly held that once a state accords such a right, it cannot be withdrawn without consideration of applicable Due Process norms. *Evitts* v. *Lucey*, 469 U.S. 387, 83 L.Ed. 2d 821, 105 S.Ct. 830 (1985). "In short, when a state opts to act in a field where its action has significant discretionary elements, it must nonetheless act in accordance with the dictates of the Constitution—and, particularly, in accordance with the Due Process Clause." *Id.* at 833. Thus, in *Evitts* v. *Lucey*, *supra*, the Due Process clause of the Fourteenth Amendment was held to guarantee a criminal defendant the right to the effective assistance of counsel on his (state created) first appeal as of right. These Due Process considerations apply as well to collateral review proceedings.

Lane v. *Brown*, 372 U.S. 477, L.Ed. 2d 892, 83 S.Ct. 768 (1963).

State procedures for collateral review proceedings implicate Equal Protection concerns, too. See *Lane* v. *Brown*, *supra*, and cases cited therein. Equal Protection concerns are involved because the states may not treat one class of defendants—indigent ones—differently for purposes of offering them a *meaningful* review. It is hard to believe, for example, that a retained attorney would file a "no merit" letter or expect to be paid for such an effort. Since an impoverished prisoner must take whatever lawyer the state grants her, and cannot "shop" for a zealous advocate, it is imperative that the court appointed counsel's efforts be scrutinized to insure that the indigent receives the same effective representation—and meaningful access to the courts—that wealthier prisoners receive. To do otherwise would deny poor prisoners the use of available collateral review procedures. In the present case, Equal Protection considerations would proscribe the use of the "no merit letter" by court appointed counsel since that procedure practically guarantees that the indigent prisoner will receive only a cursory review of her allegations concerning the fairness of the trial resulting in her conviction while prisoners able to afford retained counsel can take full advantage of the collateral review proceedings provided by the state to challenge their convictions. While Equal Protection and Due Process considerations are not identical, they frequently "converge" in this Court's analysis of cases involving an indigent prisoner's access to courts and the protection afforded by the criminal justice system. See, for example, *Bearden* v. *Georgia*, 461 U.S. 660, 76, L.Ed. 2d 221, 103 S.Ct. 2064 (1983). This court notes, in *Bearden* v. *Georgia*, *supra*, at 665, and in *Ross* v. *Moffitt*, *supra*, at

608-609 "We generally analyze the fairness of relations between the criminal defendant and the State under the Due Process clause while we approach the question whether the state has invidiously denied one class of defendants a substantial benefit available to another class of defendants under the Equal Protection clause."

Thus, this Court found it fundamentally unfair to revoke the probation of an indigent automatically upon nonpayment of a fine, without a hearing to determine whether the probationer had made all reasonable bona fide efforts to pay the fine, and to consider other sentencing alternatives, in *Bearden* v. *Georgia*, *supra*, finding that the state's automatic revocation of probation offended both the Due Process and the Equal Protection clauses of the Fourteenth Amendment.

In making that ruling, this Court echoed *Griffin* v. *Illinois*, 351 U.S. 12, 100 L.Ed. 891, 76 S.Ct. 585 (1956), in remarking, "There can be no equal justice where the kind of trial a man gets depends on the amount of money he has." *Id.* at 64. The "*Griffin* principle of equal justice" has been applied in many context to insure indigent prisoners meaningful access to the courts. See cases cited in *Bearden* v. *Georgia*, *supra*, at 664. Moreover, it is clear that the *Griffin* principle also applies to state collateral proceedings. *Lane* v. *Brown*, *supra*. There this Court struck down an Indiana practice requiring that the public defender approve requests for free transcripts for prisoners seeking collateral review of their criminal court convictions. The Court found that the restriction denied indigent defendants the benefits of an existing system of appellate review available to that state for other convicted persons. Similarly, In *Eskridge* v. *Washington State Board of Prison Terms*, 357 U.S. 214, 2 L.Ed. 2d 1269, 78 S.Ct. 1061 (1958), this Court invalidated a provision of

Washington's Criminal Appellate System which conferred upon the trial judge the power to withhold trial transcripts from indigents upon a finding that "justice would not be promoted . . . in that the defendant has been accorded a fair and impartial trial, and in the court's opinion no grave or prejudicial errors occurred therein" *Id.* at 215. This Court reasoned that it was unfair to deny indigents the full appellate review available to any defendant in Washington who could afford the expense of a transcript.[9]

As the above makes clear, it is not a Sixth Amendment right to counsel on collateral review petitions that requires the application of the *Anders* procedure for counsel seeking to withdraw, but rather that the Due Process and Equal Protection clauses of the Fourteenth Amendment mandate fair treatment of indigent prisoners by the courts and the states. Where a collateral review is provided, and where indigent petitioners are accorded the right to counsel, Due Process and Equal Protection require that the assistance of counsel be effective. Since the procedure utilized by withdrawing counsel in the case at bar rendered his assistance not only ineffective, but, actually, a hazard and a hinderance to his indigent client, its use cannot be sanctioned, and the no merit letter procedure should be specifically found a violation of the Fourteenth Amendment's protection to Due Process and Equal Protection of the laws.

---

[9] Interestingly, the procedure invalidated in *Eskridge* v. *Washington*, is substantially similar to the procedure the District Attorney urges upon this court in the case at bar, in that the trial judge or, in this case, PCHA judge, would be given the unilateral power and responsibility to determine the merits of an appeal, without benefit of an advocate's review of the record.

In fact, that is essentially the holding of *Anders* v. *California*. This Court specifically noted, "The constitutional requirement of substantial equality and fair process can only be obtained where counsel is an active advocate on behalf of his client, as opposed to that of amicus curiae. The no merit letter and the procedure it triggers do not reach that dignity. Counsel should, and can with honor and without conflict, be of more assistance to his client and to the court." *Id.* at 744. It may well be, as the Commonwealth has argued, that the *Anders* procedure is not foolproof. Nonetheless, it is clear that the no merit letter procedure employed in the instant case is not a harmless alternative since it impinges on Due Process guarantees, *Anders* v. *California*, *Id.* at 744. At least the *Anders* procedure avoids the probability that the indigent petitioner's concerns will remain unexamined by the appropriate court, as the Pennsylvania courts recognized in choosing to afford the protection of *Anders* v. *California* to PCHA indigent petitioners whose court-appointed counsel seeks leave to withdraw.

B. Pennsylvania Is Free To Adopt A More Stringent Procedure For Attorneys Seeking Leave To Withdraw From Cases Involving Indigent Prisoners Than What May Be Required By The United States Constitution.

In the alternative argued that the Pennsylvania Superior Court's decision in *Commonwealth* v. *Finley*, rests on adequate and independent state grounds. The states may, of course, offer greater due process and equal protection measures to aid their citizens than what may be required by the United States Constitution. The Post-Conviction Hearing Act is itself state legislation; the requirement that counsel be afforded rests on the PCHA and the Pennsylvania Rules of Criminal Procedure, and the application of *Anders* in this context can be seen as a

simple choice by the Pennsylvania courts to adopt a sound solution for a problem area in the courts.

Note, that the Superior Court itself stated "Pennsylvania law concerning procedure to be followed when a court-appointed attorney see no basis for an appeal *is derived from* the seminal case of *Anders* v. *California*, 386 U.S. 738, 87 S.Ct. 1396 (1967) *reh. den.* at 388 U.S. 924, 87 S.Ct. 2094." (emphasis supplied) (J.A. 21). It also states. "*Anders* has been applied in similar circumstances and, therefore, we hold that its application to the instant case is proper," without any citation to constitutional or federal requirement for so holding. (J.A. 24) *Michigan* v. *Long*, 463 U.S. 1032, 77 L.Ed. 2d 1201, 103 S.Ct. 3469 (1983) is therefore satisfied.

If, then, the application of *Anders* to a collateral review proceeding is felt not to be Constitutionally compelled, even where a state has a procedure which affords court-appointed counsel to indigents for collateral review proceedings, then this court may yet decide that Pennsylvania is free, but not required, to choose the *Anders* strategy as an appropriate mechanism for permitting court-appointed counsel to withdraw from an indigent petitioner's case, and, in so doing, this Court will defer to the judgment of the Pennsylvania Superior Court, and dismiss the Commonwealth's appeal to this Court as having been improvidently granted.

In any event, the Commonwealth must not be allowed to assert that an indigent petitioner can be afforded counsel, paid for by the state, who thereafter serves as an assistant prosecutor in briefing the case against his client, in failing to make an exhaustive search of the record to locate and advocate any issues of arguable merit, and in failing to inform the client of his intention to withdraw

from the case in sufficient time for her to proceed *pro se*, or to seek other counsel. Such "assistance" fulfills neither the ethical nor the constitutional obligations of counsel so appointed. Without benefit of an advocate's briefing, an advocate's marshalling of the facts, and an advocate's review of the record, the courts would be hardpressed to accord to the petitioner, be she indigent or not, a fair assessment of her contentions regarding the fairness and propriety of the trial that resulted in her criminal conviction and subsequent imprisonment. The existence of the Pennsylvania Post-Conviction Hearing Act compels the conclusion that Pennsylvania's interest in the fair adjudication of guilt or innocence requires the spirited give and take inherent in a properly functioning adversary system. The application of *Anders* v. *California* to instant case satisfies that standard. The "no merit letter" urged upon you by the District Attorney of Philadelphia does not.

CONCLUSION

Pennsylvania law provides court-appointed attorneys to aid indigent prisoners in the formulation, presentation and prosecution of petitions to review their criminal convictions under Pennsylvania Post-Conviction Hearing Act. The Due Process and Equal Protection clauses of the Fourteenth Amendment to the United States Constitution, applied to cases involving the rights of indigents in the criminal justice arena, as exemplified by *Griffin* v. *Illinois*, *supra*, and its progeny, require the application of the procedures outlined in *Anders* v. *California*, *supra*, to court-appointed counsel who seek leave to withdraw from the representation of an indigent where a state has chosen to provide legal assistance. Conversely, the same cases proscribe the use of the no merit letter in that situation. The use of the no merit letter affirmatively

denies indigent petitioners their Fourteenth Amendment rights, since it deprives them of the effective assistance of counsel to which they are entitled under Pennsylvania law, and instead forces them to contend with attorneys who openly advocate the Commonwealth's position to their great detriment.

In the alternative, since the Pennsylvania Superior Court decision in this case rests on independent and adequate state grounds, respondent respectfully suggests that certiorari was improvidently granted and should therefore be dismissed.

Respectfully Submitted:

CATHERINE M. HARPER
(Appointed by this Court)
HAMBURG, RUBIN, MULLIN
& MAXWELL
800 East Main Street
Lansdale, PA 19446

No. 85-2099

In The
Supreme Court of the United States
October Term, 1986

COMMONWEALTH OF PENNSYLVANIA,
Petitioner,

v

DOROTHY FINLEY,
Respondent.

ON WRIT OF CERTIORARI TO THE SUPERIOR COURT OF PENNSYLVANIA

REPLY BRIEF FOR PETITIONER

GAELE MCLAUGHLIN BARTHOLD*
Deputy District Attorney
ANN C. LEBOWITZ
Assistant District Attorney
LAURIE MAGID
Assistant District Attorney
RONALD EISENBERG
Chief, Appeals Unit
WILLIAM G. CHADWICK, JR.
First Assistant District Attorney
RONALD D. CASTILLE
District Attorney
*Counsel of Record

Office of the District Attorney
1300 Chestnut Street
Philadelphia, Penna. 19107
Telephone: (215) 875-6010

February 13, 1987

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
or call collect (402) 342-2831

TABLE OF CONTENTS

TABLE OF AUTHORITIES

No. 85-2099

In The
Supreme Court of the United States
October Term, 1986

COMMONWEALTH OF PENNSYLVANIA,
Petitioner,

v

DOROTHY FINLEY,
Respondent.

ON WRIT OF CERTIORARI TO THE SUPERIOR COURT OF PENNSYLVANIA

REPLY BRIEF FOR PETITIONER

SUPPLEMENTAL ARGUMENT

The Judgment Below Does Not Rest On An Adequate And Independent State Ground.

The Pennsylvania Superior Court specifically held *Anders v. California,* 386 U.S. 738 (1967), applicable to this case (J.A. 24). Respondent and *amicus curiae* nevertheless contend that the judgment below rests on an adequate and independent state ground. This claim is meritless.

A state court decision is presumed to be based on federal grounds and, thus, within this Court's jurisdiction, if the "state court decision fairly appears to rest

primarily on federal law," or is "interwoven with the federal law," and "the adequacy and independence of any possible state ground is not clear from the face of the opinion." *Michigan v. Long,* 463 U.S. 1032, 1040-41 (1983).[1] Where a state court intends to use federal precedent "only for the purposes of guidance," it is free to make this clear by a "plain statement" in its opinion. *Id.* There is no such "plain statement" in the opinion below. Rather, the lower court's previously-noted reliance on *Anders* makes clear that its decision rests primarily—if not solely—on federal law.

Nor is the obvious reliance on *Anders* the only basis for dismissing respondent's jurisdictional challenge. The Pennsylvania Superior Court's few references to Pennsylvania cases are so interwoven with and clearly subsidiary to federal authority that this alternative criterion of *Long* is also met. In pertinent part, the opinion below noted that Pennsylvania law governing procedures for the withdrawal of appointed attorneys who see no basis for appeal are "derived from the seminal case of *Anders v. California,*" which was adopted in *Commonwealth v. Baker,* 429 Pa. 209, 239 A.2d 201 (1968) (J.A. 21, 22).

This Court has, of course, specifically stated that it will not examine state law to determine a state court decision's basis. *See Michigan v. Long,* 463 U.S. at 1040. Even such an examination, however, would undermine, not bolster, respondent's position. *Commonwealth v. Baker,*

---

[1]The *Michigan v. Long* rule has been consistently applied to determine if an adequate and independent state ground exists. *See New York v. Class,* 106 S.Ct. 960, 964 (1986); *Caldwell v. Mississippi,* 105 S.Ct. 2633, 2638 (1985); *Ohio v. Johnson,* 467 U.S. 493, 497 n.7 (1984).

like all other relevant Pennsylvania cases, relies entirely on federal law and is without an independent state basis.[2]

Amicus curiae, the American Civil Liberties Union and the Civil Liberties Union of Pennsylvania, further erroneously rely on the Superior Court's statement—made after its finding that *Anders'* requirements had not been met—that "Pa.R.Crim.P. 1504, in affording counsel, means that counsel should act as an advocate in fulfilling his role." (J.A. at 24). Mere reference to a procedural rule does not create an adequate and independent state ground. Even where a state court decision mentions both federal constitutional law and state statutory law, this Court will infer reliance on the constitutional law since a court would not decide constitutional issues if statutory construction were sufficient to resolve the case. *See New York v. Class,* 106 S.Ct. 960, 964 (1986); *Richards v. Com., Unemp. Comp. Bd.,* 491 Pa. 162, 166 n.6, 420 A.2d 391 (1980).

Similarly baseless is respondent's contention that an adequate and independent state ground exists simply because the Pennsylvania Supreme Court's supervisory rules (Pa.R.Crim.P. 1503 and 1504) afford the right to counsel on collateral review. Those rules govern only when counsel must be appointed and do not address the circumstances under which counsel may withdraw. Thus, they are irrelevant to *Anders* and certainly do not support respondent's claim.

---

[2]*Commonwealth ex rel. Cunningham v. Maroney,* 421 Pa. 157, 218 A.2d 811 (1966), which is the only Pennsylvania decision cited in *Baker* and is relied upon by *amicus curiae* (although only a "cf." cite), was concerned entirely with the *Douglas v. California,* 372 U.S. 353 (1963), right to counsel on direct appeal.

This case is properly before the Court for decision. The judgment below does not rest on an adequate and independent basis which defeats this Court's jurisdiction.

Respondent Was Not Prejudiced By Her Prior Counsel's Alleged Failure To Communicate With Her Or To Raise Certain Purportedly Meritorious Issues.

Respondent and *amicus curiae* additionally contend that the likelihood of flawed and ineffective performances by counsel appointed to represent indigents on collateral review will be substantially increased if this Court does not apply *Anders'* strict withdrawal procedures. They object particularly to counsel's putative lack of notice to respondent and argue that notice of an intention to withdraw is essential adequately to protect indigents on collateral review. Neither these nor any of their alternative contentions, however, support this Court's affirmance of the opinion below.

There is no federal constitutional right to counsel on collateral review (Brief for Petitioner at 21). States may, of course, choose—as does Pennsylvania—to provide counsel for such proceedings. *See Ross v. Moffitt,* 417 U.S. 600, 618 n.12 (1974). Such a voluntary act, however, should not require a jurisdiction to shoulder the additional burdens associated with *Anders.* Indeed, imposition of such obligations could have adverse and unfortunate consequences. The many states that now voluntarily and routinely provide appointed collateral review counsel would have the incentive no longer to provide such assistance.

This should not be permitted to occur. While *Anders* may be justified to protect an indigent's constitutional

right to counsel on direct appeal, its extension to protect a non-constitutional right to counsel is unnecessary. Post-*Anders* decisions of this Court make that clear.

Counsel, whether retained or appointed, are subject to the same ethical obligations. *See Polk County v. Dodson,* 454 U.S. 312, 323 (1981). These obligations include a duty to consult with the client and keep him informed of the case's important developments. *See Strickland v. Washington,* 466 U.S. 668, 688 (1984). *See also* A.B.A. Model Code of Professional Conduct 1.4 and Comment (duty of counsel to communicate and keep client reasonably informed of case's status). Further, it is this Court's considered view that counsel is "strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." *Strickland* at 690.

The foregoing authority contravenes *Anders'* extension which would necessarily assume that appointed attorneys provide less zealous and less effective representation than other counsel, and do not comply fully with their ethical obligations. Each state is best able to judge the quality of its *in forma pauperis* bar—with which it has now had much experience.[3] The states should be free to experiment, and the question of how the rights of indigents on collateral review should be protected is most appropriately left to them.

Strickland likewise undermines respondent's further assumption that she has been prejudiced by her former

---

[3]*See Anders v. California,* 386 U.S. at 745 (Dissenting Opinion, Stewart, J., joined by Black and Harlan, JJ.) ("quixotic" requirements of *Anders* premised on an unjustified distrust for the *in forma pauperis* bar).

counsel's withdrawal. Prejudice because of an attorney's deficient performance is presumed in only rare instances. Absent a conflict of interest claim—an allegation not here made—ineffectiveness claims "are subject to a general requirement that the defendant affirmatively prove prejudice." *Strickland,* 466 U.S. at 692. Respondent cannot meet this burden with respect to counsel's alleged failure to give notice or otherwise.[4]

Here, appointed post-conviction counsel, after reviewing the transcript and meeting with his client, advised the state post-conviction judge of the nature of his record review and sought to withdraw since neither he nor his client could find any additional, non-frivolous and non-finally-litigated issues to raise. The letter making this request indicates on its face that a copy was sent to respondent

---

[4]While recognizing that the "possible merits" of respondent's P.C.H.A. petition are now inappropriate for speculation, her counsel nevertheless apparently seeks to demonstrate prejudice by showing that arguable claims exist (Brief for Respondent, n.7 at 15). Even a cursory review of the record, however, substantiates their frivolity: (1) a more detailed, thorough and comprehensive jury trial waiver colloquy can hardly be imagined (N.T. 10/14/75, 6-36); (2) extensive testimony regarding the placement of a package in respondent's apartment closet was, in fact, permitted by the trial judge (N.T. 10/15/75, 98-110); (3) the trial judge specifically rejected any claim that the physical evidence was "the fruit of the poison tree" when he denied suppression of this evidence (Findings of Fact and Conclusions of Law, 10-11); (4) the Pennsylvania Supreme Court has held that defendants on collateral review cannot obtain relief based on the "merger" claim which respondent references. *Commonwealth v. Gillespie,* 516 A.2d 1180, 1183 (Pa. 1986). Further, no unspecified ineffectiveness claim is apparent from the record, and the sufficiency claim which respondent herself wishes to press is both finally litigated under Pennsylvania law (J.A. 6; 42 Pa.Cons.Stat.Ann. § 9544 (Purdon 1982)) and substantively meritless (Brief for Petitioner at 4-6).

(J.A. 9). Based on this endorsement, it can be fairly assumed that respondent in fact received the letter, and that counsel did what he may or may not have been obliged to do, *i.e.*, to notify her of his intention to withdraw.

Moreover, even assuming non-receipt, respondent's argument still fails for the simple reason that she was not prejudiced thereby. Counsel's no merit letter was not simply accepted below, as would have been appropriate. Instead, an independent judicial review of the record was conducted by the post-conviction judge (J.A. 14), followed by the appointment of new counsel on collateral appeal.

Finally, since Pennsylvania sets no limit on the number of post-conviction petitions that a convicted criminal can file, any alleged lack of notice affecting the dismissal of respondent's initial petition was without prejudicial effect. Respondent is not precluded from seeking further state collateral review by filing, under the state statutory scheme, yet another petition raising issues which are not finally litigated under Pennsylvania law.

—o—

CONCLUSION

For the foregoing reasons, as well as the reasons set forth in petitioner's principal brief, it is respectfully requested that the order of the Pennsylvania Superior Court

be reversed and the case remanded for further proceedings consistent with this Court's opinion.

Respectfully submitted,

GAELE MCLAUGHLIN BARTHOLD*
Deputy District Attorney
ANN C. LEBOWITZ
Assistant District Attorney
LAURIE MAGID
Assistant District Attorney
RONALD EISENBERG
Chief, Appeals Unit
WILLIAM G. CHADWICK, JR.
First Assistant District Attorney
RONALD D. CASTILLE
District Attorney

*Counsel of Record

Office of the District Attorney
1300 Chestnut Street
Philadelphia, Penna. 19107
Telephone: (215) 875-6010

February 13, 1987

No. 85-2099

IN THE

Supreme Court of the United States

October Term, 1986

COMMONWEALTH OF PENNSYLVANIA,

Petitioner,

v.

DOROTHY FINLEY,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPERIOR COURT OF PENNSYLVANIA

BRIEF OF THE STATE OF INDIANA AND THE COMMONWEALTHS AND STATES OF CALIFORNIA, CONNECTICUT, DELAWARE, FLORIDA, HAWAII, IDAHO, KANSAS, KENTUCKY, LOUISIANA, MISSOURI, SOUTH CAROLINA, VIRGINIA, WISCONSIN, WYOMING

LINLEY E. PEARSON
Attorney General of Indiana

WILLIAM E. DAILY
Deputy Attorney General

LISA M. PAUNICKA
Deputy Attorney General

Office of Attorney General
219 State House
Indianapolis, Indiana 46204
Telephone: (317) 232-6351

Central Publishing Company, Inc., Indianapolis, IN 46206

QUESTION PRESENTED

Does an indigent criminal defendant's sixth amendment right to a meaningful first appeal pursuant to *Anders v. California*, 386 U.S. 738, 87 S.Ct. 1396 (1967), extend to state court collateral review proceedings?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

No. 85-2099

IN THE

Supreme Court of the United States

October Term, 1986

COMMONWEALTH OF PENNSYLVANIA,

Petitioner,

v.

DOROTHY FINLEY,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPERIOR COURT OF PENNSYLVANIA

BRIEF OF THE STATE OF INDIANA AND THE COMMONWEALTHS AND STATES OF CALIFORNIA, CONNECTICUT, DELAWARE, FLORIDA, HAWAII, IDAHO, KANSAS, KENTUCKY, LOUISIANA, MISSOURI, SOUTH CAROLINA, VIRGINIA, WISCONSIN, WYOMING

INTEREST OF AMICI CURIAE

Surely no fair-minded persons will contend that those who have been deprived of their liberty without due process ought nevertheless to languish in prison.[1]

All litigation must come to an end at some time.[2]

[1] *Fay v. Noia*, 372 U.S. 391, 83 S.Ct. 822 (1963).

[2] *Etheridge v. State*, 240 Ind. 384, 386, 164 N.E.2d 642, 644 (1960).

The foregoing statements disclose the tension inherent in the law regarding collateral attacks on criminal convictions. On one hand, society deems liberty to be of transcending value.[3] The "wrongful" deprivation of liberty merits curative action and the process used to deprive one of liberty includes corrective process after "final" judgment. On the other hand, the state and society have an interest in attaching finality to criminal judgments. The specter of endless attacks on a criminal judgment generates distaste because of the potential for abuse and because such a process may undercut legitimate state interests.

Indeed, the number of criminal post-conviction appeals to already overburdened courts has grown substantially. A significant part of this increase is due to greater accessibility of the appellate procedure to indigents. Consequently, in some cases, courts have been confronted with post-conviction appeals that present frivolous issues for review from indigents who have nothing to lose by appealing.[4] These frivolous indigent appeals present problems for the court-appointed attorney. Appointed counsel must balance the potentially conflicting duties to zealously represent the indigent while not presenting frivolous arguments to the court.

In *Anders v. California*, 386 U.S. 738, 739, 87 S.Ct. 1396, 1397 (1967), the Supreme Court considered the "extent of the duty of a court-appointed appellate counsel to prosecute a *first appeal* from a criminal conviction, after that attorney has conscientiously determined that there is no merit to the indigent's appeal" (emphasis supplied). The *Anders* opinion has been interpreted as requiring that a request to withdraw be accompanied by a brief referring to anything in the record that might support the appeal. The

[3] *In re Winship*, 397 U.S. 358, 90 S.Ct. 1068 (1970).

[4] *Douglas v. California*, 372 U.S. 353, 83 S.Ct. 814 (1963) (Clark, J., dissenting).

amici curiae submit that since an indigent has no constitutional right to post-conviction review, the Pennsylvania Superior Court erroneously extended the *Anders* direct appeal requirement to post-conviction proceedings; that the application of *Anders* to post-conviction review has created a disservice to appellate counsel, appellate courts, and criminal appellants; and that a "no-merit" letter is a sufficient alternative which would comport with the dictates of equal protection and with an attorney's ethical responsibilities to both court and client.

STATEMENT OF THE CASE

In 1975, the Respondent, represented by appointed counsel, was convicted of second-degree murder. Following an appeal, the Pennsylvania Supreme Court affirmed the Respondent's conviction. Subsequently, the Respondent, *pro se*, filed a petition for post-conviction relief in the Philadelphia Court of Common Pleas which alleged the same issues previously rejected by the state supreme court on direct appeal. Consequently, the Court of Common Pleas summarily denied the petition without the appointment of counsel and a hearing.

Nevertheless, the Respondent, by counsel, appealed to the Pennsylvania Supreme Court. While her appeal did not set forth any substantive claims of error, the Respondent successfully argued that the Court of Common Pleas erred by summarily denying the petition for post-conviction relief without appointing counsel. The Pennsylvania Supreme Court remanded the case to the Court of Common Pleas with instructions to determine whether the Respondent was indigent and, if so, to appoint counsel for proceedings under the state post-conviction hearing act. As a result, the Court of Common Pleas appointed counsel. After reviewing the record of proceedings and conferring with the Respondent, counsel concluded that there was no basis for collateral relief. Counsel advised the Court of Common Pleas of his determination, by means of a letter, and requested to withdraw from the case.

Subsequently, the Court of Common Pleas reviewed the case and not only concluded that the record of proceedings was devoid of meritorious issues under the state post-conviction hearing act, but also refused to compel counsel to present frivolous collateral claims. Thus, the Court of Common Pleas permitted counsel to withdraw and dismissed the Respondent's petition for post-conviction relief. The Respondent, however, by appointed counsel, appealed the dismissal to the Pennsylvania Superior Court which remanded the case for further post-conviction proceedings on the ground that prior post-conviction counsel failed to comply with requirements set forth in *Anders v. California* 386 U.S. 738, 87 S.Ct. 1396 (1967).

SUMMARY OF THE ARGUMENT

The procedures set forth in *Anders v. California*, 386 U.S. 738, 87 S.Ct. 1396 (1967) do not extend to state court collateral review proceedings.

ARGUMENT

In *Anders v. California*, 386 U.S. 738, 87 S.Ct. 1396 (1967), the Supreme Court addressed the duty of a court-appointed attorney to prosecute a first appeal from a criminal conviction. In the opinion, the Supreme Court briefly reviewed a line of cases beginning with *Griffin v. Illinois*, 351 U.S. 12, 76 S.Ct. 585 (1956), regarding the necessity of providing a transcript for indigent defendants on appeal, through *Douglas v. California*, 372 U.S. 353, 83 S.Ct. 814 (1963), regarding appointment of counsel on appeal, and *Gideon v. Wainwright*, 372 U.S. 335, 83 S.Ct. 792 (1963) regarding the right to the assistance of counsel.

Anders is premised on the proposition that a criminal defendant has a right to counsel on first appeal. Consequently, since there is no right to counsel in pursuing either state or federal discretionary appeals, *Ross v. Moffitt*, 417 U.S. 600, 94 S.Ct. 2437 (1974), there is no right to counsel on collateral review. *Bounds v. Smith*, 430 U.S.

817, 839, 97 S.Ct. 1491, 1504 (1977). Accordingly, there is no basis for granting the *Anders* protections to criminal defendants pursuing collateral review proceedings. *United States ex rel. Curtis v. People of State of Illinois*, 521 F.2d 717, 720 (7th Cir. 1975).[5]

In addition, in *Anders*, the Supreme Court set forth strict requirements to be followed when counsel determines, in good faith, that the defendant's appeal is frivolous. Generally, the procedure requires the attorney to inform the court of his belief that the appeal lacks merit, to request permission to withdraw, and to submit a brief referring to anything in the record that might arguably support the appeal. This procedure is a disservice to appellate counsel, appellate courts, and criminal defendants.

Anders creates several problems for appellate counsel. First, counsel's ethical obligations compel him to refrain from asserting frivolous claims. Indeed, counsel who fully believes a case to be frivolous cannot, while requesting leave to withdraw, be an advocate for reversal of the conviction. Second, if counsel discovered anything in the record that might arguably support the appeal, he would not have sought permission to withdraw.[6] If counsel, however, is convinced that the case is frivolous, references to the record and to legal authority amount to a brief against his client.[7]

---

[5] Also, in *State v. Shattuck*, 140 Ariz. 582, 684 P.2d 154, 157 (1984), the Supreme Court noted:

> Since we are not required to accept petitions for review in *Anders* type cases, we do not invite them. The system is strained to the point that we cannot afford the luxury of repeated review of trivia or issues of small merit. The time available to prosecutors, defenders, judicial staff, and judges must be devoted to issues of substance.

[6] *Anders*, 386 U.S. at 747, 87 S.Ct. at 1401 (dissenting opinion).

[7] *Hermann*, Frivolous Criminal Appeals, 47 N.Y.U.L. Rev. 701, 711-712 (1972).

Moreover, *Anders* poses difficulties for appellate courts. *Anders* requires that an appellate court abandon its traditional role as an adjudicatory body and enter the appellate arena as an advocate.[8] This process not only places an enormous burden on the appellate courts, but also creates an anomaly: an appellate court must search the record for error when counsel has found none, although it need not do so when counsel finds and argues one claim of error. In *People v. Wende*, 87 Cal. App. 3d 389, 150 Cal. Rptr. 840 (1979) rev'd, 25 Cal. 3d 436, 158 Cal. Rptr. 839, 843, 600 P.2d 1071, 1075 (1980), the court noted:

> ... under this rule counsel may ultimately be able to secure a more complete review for his client when he cannot find any arguable issues then when he raises specific issues, for a review of the entire record is not necessarily required in the latter situation.

Anders does not explain why such a review is required by due process, equal protection, the right to counsel, or any other constitutional provision. An indigent appellant certainly has the same right to present an appeal as one who is not indigent, but it is not clear why an indigent should have a right to a more comprehensive appeal process than a non-indigent.

Further, the most significant problem in applying *Anders* in post-conviction relief cases is that the hardships it imposes upon appointed counsel and appellate courts are unnecessary to vindicate constitutional principles. In *Ross v. Moffitt*, 417 U.S. 600, 94 S.Ct. 2437 (1974), the Supreme Court noted that even though the constitutional basis for the *Griffin* and *Douglas* line of cases is found in the due process and equal protection clauses, the due process rights

[8] *Anders* has been interpreted to require that the appellate court review the entire record to determine whether the appeal is, in fact, frivolous. *See, e.g. United States v. Jackson*, 578 F.2d 1162 (5th Cir. 1978); *State v. Porter*, 125 Ariz. 355, 609 P.2d 1055 (1980).

of a convicted defendant are not really so compelling as those which exist before a determination of guilt has been made.[9] In *Ross*, the Supreme Court stated that the fact that an appeal has been provided does not require the state to provide counsel to indigent defendants at every step of the procedure. *Ross*, 417 U.S. at 611-612, 94 S.Ct. at 2444-2445. Moreover, after ruling that the state is not required to provide counsel at state expense for discretionary appeals to the state supreme court, the Supreme Court noted:

> And the fact that a particular service might be of benefit to an indigent defendant does not mean that the service is constitutionally required. The duty of the State under our cases is not to duplicate the legal arsenal that may be privately retained by a criminal defendant in a continuing effort to reverse his conviction, but only to assure the indigent defendant an adequate opportunity to present his claims fairly in the context of the State's appellate process.

417 U.S. at 616, 94 S.Ct. at 2446.

Accordingly, the requirements of due process and equal protection do not mandate the application of *Anders* to post-conviction review proceedings. The basic necessities for a criminal appeal are a transcript of the record of proceedings, or an equivalent alternative, and a competent attorney to examine both the record and the law conscientiously as an advocate for the appellant. Counsel should, and must, raise whatever issues "arguably support the appeal," including arguments for change in established law when a basis for advocating such change exists. If, following conscientious examination of the case, appointed counsel determines that there are no non-frivolous issues to present on appeal, counsel should so notify the court and

[9] In *McKane v. Durston*, 153 U.S. 684, 14 S.Ct. 913 (1894), the Supreme Court ruled that the state need not provide any appeal from a criminal conviction.

appellant. The right to counsel does not require appointed counsel to present frivolous issues to an appellate court.[10]

Finally, the amici curiae submit that a "no merit" letter is an adequate alternative to the *Anders* brief for purposes of state collateral review proceedings. In *Nickols v. Gagnon*, 454 F.2d 467 (7th Cir. 1971), the court ruled that the *Anders* decision was inapplicable in a situation where a "no merit" letter, prepared by appointed counsel, was not a mere "conclusory statement," but included a reasoned exposition of the basis for his conclusion. Indeed, *Anders* does not require that a petition to withdraw be accompanied by a brief *arguing* anything in the record that might support the appeal. Further, the word "brief", itself, does not necessarily connote an adversarial presentation of points that are demonstrably without merit. Rather, the term, "brief," connotes "a 'professional exposition of all points which have sufficient significance that trained counsel would at least identify and consider them in his evaluation of an appeal." *Nickols v. Gagnon*, 454 F.2d at 471.

The concerns of the Supreme Court in *Anders* would be served by a "no merit" letter, as in *Nickols*, since the letter would reflect the kind of professional analysis which a trained advocate might make as a predicate to the preparation of an appellate brief. Requiring counsel to refer to only those issues which might support an appeal, removes counsel from the "quixotic" position of marshalling support for issues which he has concluded to be frivolous. *Anders v. California*, 386 U.S. 739, 747, 87 S.Ct. 1396, 1401 (dissenting opinion).

---

[10] Indeed, the right to counsel does not even require that appointed counsel present all non-frivolous issues to an appellate court. *Jones v. Barnes*, 463 U.S. 742, 103 S.Ct. 3308 (1983).

CONCLUSION

For the foregoing reasons, the decision of the Pennsylvania Superior Court should be reversed.

Respectfully submitted,

LINLEY E. PEARSON
Attorney General of Indiana

WILLIAM E. DAILY
Deputy Attorney General

LISA M. PAUNICKA
Deputy Attorney General

Office of Attorney General
219 State House
Indianapolis, Indiana 46204
Telephone: (317) 232-6351

No. 85-2099

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1986

COMMONWEALTH OF PENNSYLVANIA,
Petitioner,

v.

DOROTHY FINLEY,
Respondent.

ON WRIT OF CERTIORARI TO THE
SUPERIOR COURT OF PENNSYLVANIA

BRIEF OF THE NATIONAL LEGAL AID AND DEFENDER ASSOCIATION, AMICUS CURIAE IN SUPPORT OF RESPONDENT

NATIONAL LEGAL AID AND
DEFENDER ASSOCIATION
1625 K Street, NW
Washington, D.C. 20006

By: DAVID P. BERGSCHNEIDER
Office of the State
Appellate Defender
300 East Monroe, Suite 102
Springfield, IL 62701
(217) 782-3654

COUNSEL FOR AMICUS CURIAE

TABLE OF CONTENTS

TABLE OF AUTHORITIES

No. 85-2099

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1986

COMMONWEALTH OF PENNSYLVANIA,
Petitioner,

v.

DOROTHY FINLEY,
Respondent.

ON WRIT OF CERTIORARI TO THE
SUPERIOR COURT OF PENNSYLVANIA

BRIEF OF THE NATIONAL LEGAL AID AND DEFENDER ASSOCIATION, AMICUS CURIAE IN SUPPORT OF RESPONDENT

INTEREST OF AMICUS CURIAE

The National Legal Aid and Defender Association (NLADA) is a private, non-profit, national membership organization headquartered in Washington, D.C., whose purpose is to insure the availability of

quality legal services in civil and criminal cases to all persons unable to retain counsel. Specifically, NLADA represents approximately 1,753 programs engaged in providing representation to indigents in civil cases, and 586 defender offices engaged in providing representation to indigents arrested on criminal offenses. The membership of NLADA, therefore, comprises most public defender offices and legal service agencies around the nation, as well as assigned counsel plans and private practitioners.

NLADA is vitally interested in assuring that indigent criminal defendants are guaranteed access to state collateral remedies similar to that enjoyed by criminal defendants who are not indigent. In this case, the Court will decide whether an indigent who is appointed counsel under a state statute

which guarantees the assistance of counsel for an initial post-conviction petition is afforded the protections required by the Due Process and Equal Protection Clauses of the Fourteenth Amendment where, without notice to his client that she may respond, the attorney informs the trial court that there is no merit to the post-conviction petition. NLADA respectfully requests this Court to consider its brief on this significant public question.

STATEMENT OF THE CASE

Ms. Finley was convicted in 1975 on a number of counts, including murder. In her appeal of right to the Pennsylvania Supreme Court, she challenged the sufficiency of the evidence and the admissibility of search and seizure evidence.

The conviction was affirmed. Commonwealth v. Finley, 477 Pa. 211, 383 A.2d 898 (1978).

Ms. Finley filed a petition for post-conviction relief under the Pennsylvania Post-Conviction Hearing Act. This petition was denied without a hearing and without the appointment of counsel. On appeal, the Pennsylvania Supreme Court held that state law requires that counsel be appointed for an indigent on her first post-conviction petition. 497 Pa. 332, 440 A.2d 1183 (1981). The case was remanded for appointment of counsel.

A lawyer was assigned, and informed the trial court that in his opinion there were no arguably meritorious issues in the post-conviction petition. Counsel was instructed to review the entire record and applicable law, and to interview Ms. Finley to ascertain any

additional issues. Counsel was informed that if he still concluded that the record was devoid of any arguable contentions, he should specify by letter not only the nature and extent of his review, but also the issues which Ms. Finley wished to have raised and an explanation why those issues lacked merit. (J. A. 13-14)

Subsequently, counsel wrote to the trial court indicating that he had reviewed the "Notes of Testimony" and met with the defendant, but could find no issues which were arguably meritorious. Counsel indicated that Ms. Finley did not wish to raise any issues other than those in the pro se petition, and that those issues were in his opinion without merit because one had been litigated on direct appeal and the other involved questions of the credibility of witnesses. (J.

A. 9) In response to counsel's letter, Ms. Finley's post-conviction petition was dismissed. (J. A. 17)

The Superior Court of Pennsylvania found that counsel's letter did not comply with the requirements of Anders v. California, 386 U.S. 738 (1967), and remanded the cause for a new hearing. 330 Pa. Super. 313, 479 A.2d 568 (1984). The Pennsylvania Supreme Court granted leave to appeal, then dismissed the grant as improvident. 507 A.2d 822 (1986). This Court granted the State's petition for a writ of certiorari.

SUMMARY OF ARGUMENT

Although a state is not required to provide a system of post-conviction collateral review in criminal cases, once it chooses to do so it must meet the

requirements of the Due Process and Equal Protection Clauses of the Fourteenth Amendment. The Due Process Clause requires that a state treat its citizens in a fair and nonarbitrary manner, while the Equal Protection Clause demands that groups of similarly situated persons not be treated in an unequal manner.

The practice utilized to dismiss Ms. Finley's post-conviction petition violated the Due Process Clause because Ms. Finley was not notified of her counsel's motion to withdraw in time to allow her to respond, and because counsel was not required to demonstrate that he had comprehensively examined the record and sought to present any issues available. While the formal requirements of Anders v. California may not necessarily apply, fundamental fairness requires that a post-conviction petitioner be notified

of her counsel's intent to withdraw and that there be a sufficient basis for the court to determine that counsel's evaluation of the merits is accurate.

The procedure used in this case also violates the Equal Protection Clause because it deprives indigent persons of reasonable access to the courts, in that it gives appointed counsel, rather than the judicial system, the power to determine whether a post-conviction petition is meritorious.

Because the procedure under which Ms. Finley's post-conviction petition was dismissed violates both the Due Process and Equal Protection Clauses of the Fourteenth Amendment, the relief granted by the lower court should be affirmed.

ARGUMENT

WHERE A STATE ELECTS TO PROVIDE A SYSTEM OF COLLATERAL REVIEW WHICH INCLUDES THE RIGHT TO APPOINTED COUNSEL, THE DUE PROCESS AND EQUAL PROTECTION CLAUSES OF THE FOURTEENTH AMENDMENT ARE VIOLATED WHERE A PETITION IS DISMISSED UPON COUNSEL'S SUMMARY ASSERTION, WITHOUT NOTICE TO THE DEFENDANT, THAT THERE ARE NO MERITORIOUS ISSUES.

Contrary to the Commonwealth's assertion, the primary question involved in this case is not whether the requirements of Anders v. California, 386 U.S. 738 (1967), should be extended to state collateral proceedings. Instead, this case presents a question under a separate area of Fourteenth Amendment law -- once a state has chosen to provide a remedy which is not constitutionally required, under what circumstances may it withdraw that remedy from certain of its citizens? Interests of fundamental fairness and

equal protection mandate that a state which has elected to provide indigents with counsel for post-conviction review not deprive them of their right to such review without notice and an opportunity to respond, and without insuring that counsel has comprehensively reviewed the case and attempted to argue every meritorious issue.

Although there is no constitutional requirement that a state establish a system of collateral review, United States v. MacCollom, 426 U.S. 317 (1976) (plurality opinion), once a state decides to establish such a system, it must comply with the Due Process and Equal Protection Clauses of the Fourteenth Amendment. In Evitts v. Lucey, 469 U.S. 387 (1985), this Court considered a case in which a state's rules of appellate procedure required dismissal of an appeal

because of counsel's failure to file a necessary document. The State specifically argued that because it was not constitutionally required to establish any right to appeal, the operation of the system which it chose to establish was immune from constitutional scrutiny. This Court rejected this argument, finding that although there is no requirement that a state provide appellate review, once it chooses to do so it must conform with due process and equal protection requirements. 469 U.S. at 401.

Similarly, in Griffin v. Illinois, 351 U.S. 12 (1956), this Court held that although Illinois was not required to provide any right to appeal, it could not administer its appellate system in a manner which discriminated against persons on the basis of poverty. The

Griffin court concluded that because Illinois had made appellate review an integral part of its criminal justice system, due process and equal protection considerations applied to criminal appeals, and indigents could not be denied the right to appeal because they could not afford to purchase a transcript. 351 U.S. at 18. In Burns v. Ohio, 360 U.S. 252 (1959), this Court again held that although Ohio was not obligated to establish an appellate system, once it chose to do so it could not foreclose indigents from that system by requiring that a filing fee be paid. 360 U.S. at 257.

Although Evitts, Griffin, and Burns involved direct appeals from state convictions, this Court has often held that state collateral remedies are also subject to the Fourteenth Amendment.

Smith v. Bennett, 365 U.S. 708 (1961), invalidated a state requirement that an application for writ of habeas corpus could be docketed only if a filing fee was paid. Because the right to file for a writ of habeas corpus was a "critical right" which Iowa had extended to all prisoners, this Court found that the Equal Protection Clause prohibited restrictions on the writ's availability which were based on indigency. 365 U.S. at 712.

In Lane v. Brown, 372 U.S. 477 (1963), the defendant sought to appeal the trial court's denial of his application for a writ of error coram nobis. Under Indiana law only the Public Defender could request a transcript for appeal, and the Public Defender refused to make such a request because he believed that any appeal would be unsuccessful. This

Court reiterated that the Fourteenth Amendment applies to state systems of appellate or post-conviction review, and found that the Equal Protection Clause was violated where a state statute permitted the Public Defender to deprive an indigent of his state right to an appeal. 372 U.S. at 485.

The Commonwealth of Pennsylvania has, in its discretion, provided a Post-Conviction Hearing Act as an essential part of its criminal justice system. In addition, Pennsylvania has provided indigent petitioners with the right to court-appointed counsel on their first petitions.[1] The issue in this case, therefore, is whether the procedure under

---

1 Commonwealth v. Finley, 497 Pa. 332, 440 A.2d 1183 (1981); Pa. R. Crim. P. 1503-1504.

which Ms. Finley's post-conviction petition was dismissed comports with the Due Process and Equal Protection Clauses of the Fourteenth Amendment.

The Due Process and Equal Protection Clauses protect separate interests and involve distinct inquiries. The Due Process Clause emphasizes the degree of fairness in dealings between the state and the individual, without regard to how other individuals in the same situation are treated. The Equal Protection Clause, by contrast, concerns itself with the disparity in treatment between classes of individuals who are similarly situated. Evitts v. Lucey, 469 U.S. 387, 405 (1985). See also Ross v. Moffitt, 417 U.S. 600, 609 (1974) (neither due process nor equal protection requires appointment of counsel on discretionary state appeals.) Prior decisions which

have applied the Fourteenth Amendment to state appellate and post-conviction procedures have relied upon both clauses. In Griffin v. Illinois, 351 U.S. 12 (1956), for example, the Court held that the requirement that a defendant pay for his own transcript in order to obtain an appeal violated the Equal Protection Clause because it deprived a poor person of an equal opportunity to appeal his conviction. In addition, the Illinois practice violated the Due Process Clause because it allowed an appeal to be decided in an arbitrary fashion, in that success or failure depended not upon the merits of the issues but upon whether the defendant could afford a transcript. Evitts v. Lucey, supra, 469 U.S. at 403-404. See also Ross v. Moffitt, supra, 417 U.S. at 608-609.

The practice in question here violates both due process and equal protection because it results in dismissal of post-conviction petitions on an arbitrary and fundamentally unfair basis, and because it permits an unacceptable disparity between the treatment of post-conviction petitions filed by indigents and those filed by nonindigents. The procedure utilized in this case is arbitrary and unfair because, as the lower court noted, there is no indication that Ms. Finley was served with a copy of her attorney's letter advocating the dismissal of her appeal and informed that she could respond. 479 A.2d at 571. Certainly an indigent who had been appointed counsel would reasonably expect that her attorney would advocate only positions which would justify a reversal of her conviction. At

the minimum, she could rely on her attorney not to argue that her case lacked merit. In order to be fundamentally fair, a procedure which allows appointed counsel to withdraw should require notice to the defendant which informs her that she may seek other counsel or respond on her own.[2]

The trial court's procedure was also fundamentally unfair because, although Pennsylvania has recognized that the assistance of counsel is of such importance to post-conviction petitioners that counsel should be appointed at public expense where the petitioner is indigent,

---

2 See also Enteminger v. Iowa, 386 U.S. 748 (1967), in which this Court found unconstitutional a state statute which permitted counsel to file only a partial record on appeal without notifying the defendant of his decision that a complete record was unnecessary.

a proceeding can be dismissed without any assurance that counsel has performed his obligation to examine the record fully and determine whether any issues can be argued. The letter filed in this case stated only that counsel had examined the "Notes of Testimony" rather than the entire record, and contained no discussion of the applicable law or explanation of counsel's conclusion that the issues were meritless. It cannot be concluded from this record that counsel thoroughly examined the record and researched the law before determining that there were no issues to be raised. Therefore, it cannot be determined that Ms. Finley received the assistance of counsel contemplated by the Commonwealth of Pennsylvania when it extended the

right of appointed counsel to all indigents.[3]

Due process requires that criminal proceedings be conducted in accordance with "prevailing notions of fundamental fairness." California v. Trombetta, 467 U.S 479 (1984). Certainly prevailing notions of fundamental fairness are violated by a procedure which permits an individual's post-conviction petition to be dismissed upon her attorney's summary assertion that her issues lack merit. Should this Court find that Anders v. California need not be applied to this situation, it should at a minimum require counsel to establish that he has examined

---

3 Under the circumstances of this case the adequacy of counsel's review is especially open to question in light of appellate counsel's identification of several issues which were arguably meritorious. 479 A.2d 572-573.

the entire record, thoroughly researched all possible issues, served the petitioner with a copy of his motion to withdraw, and informed her that she may communicate directly with the court. Any lesser requirement does not insure fundamental fairness in dealings between the State and the individual petitioner.

The procedure utilized in this case also violates the Equal Protection Clause of the Fourteenth Amendment because it results in disparity of treatment based upon poverty and denies indigents reasonable access to the Pennsylvania post-conviction system. Where a state elects to provide a remedy which is not constitutionally required, the Equal Protection Clause requires that indigents have a reasonable opportunity to present their claims to a court of competent

jurisdiction. Ross v. Moffitt, supra, 417 U.S. at 612; United States v. MacCollom, supra, 426 U.S. at 324.

Under the Pennsylvania system, convicted persons with means to hire counsel will receive the benefit of counsel's investigation and research, will have their post-conviction claims presented and argued in the most favorable light, and will have the merits of those claims determined by the trial court. It is highly unlikely that an individual with privately-retained counsel will discover, as Ms. Finley did in this case, that her attorney has moved to withdraw and informed the court that the post-conviction claims are without merit. Therefore, permitting dismissal of a post-conviction claim merely on the assertion of counsel means that, in practice, only persons without sufficient

resources to hire their own attorneys will have their petitions dismissed without having the merits of those petitions examined by a judge.

Furthermore, dismissal of a post-conviction petition on counsel's assertion of lack of merit may preclude a petitioner from ever having those issues litigated. For example, Pennsylvania law allows summary dismissal, without the appointment of counsel, of petitions which raise issues which were the subject of previous petitions. Commonwealth v. Finley, 497 Pa. 332, 440 A.2d 1183 (1981); Pa. R. Crim. P. 1504. Therefore, appointed counsel's determination that issues have no merit, if accepted by the trial court, may well prevent even meritorious issues from being considered

at a later time. [4]

In essence, the procedures in this case mirror those found constitutionally

---

[4] Several states which provide post-conviction remedies have similar provisions barring consideration of claims which were raised in previous petitions. For example, Illinois law expressly provides that any issues not raised in the initial post-conviction proceeding are waived. Ill.Rev.Stat., 1985, Ch. 38, §122-3. See also, e.g., Ark. R. Crim. P. 37.2(b) (any ground not raised in original proceeding is barred from subsequent petition); Del. Super. Ct. Crim. R. 35(a) (court need not entertain successive motions which request relief which was denied in earlier petition); Mo. Sup. Ct. R. 27.26 (court "shall not entertain" successive motions where ground for relief could have been raised in original motion); Neb. Rev. Stat., Ch. 29, §29-3001 (successive petitions need not be entertained unless grounds relied upon in second petition were not available at time of original motion, see State v. Ohler, 366 N.W.2d 771 (1985)); Ky. R. Crim. P. 11.42(3) (final disposition of motion for collateral relief bars all issues which could reasonably have been presented.)

unacceptable in Lane v. Brown, 372 U.S. 477 (1963). In Lane, Indiana law provided that the Public Defender be assigned to represent all indigents on appeal, and that only the Public Defender could obtain a transcript at public expense. The petitioner sought representation on appeal, but the Public Defender, believing that an appeal would be unsuccessful, declined to either enter an appearance or request the transcript. In finding that the Indiana practice violated equal protection, this Court held that a state could not, based solely on indigency, confer upon appointed counsel the power to deprive the defendant of a remedy which the State provided as a matter of right.

The procedure used in this case suffers from the same deficiency. Pennsylvania law allows all convicted

persons the right to file a post-conviction petition, and provides that indigents shall have the assistance of court-appointed counsel. By dismissing the petition merely upon counsel's representation that it lacked merit, however, the trial court permitted a non-judicial officer to make a final and unreviewable determination of Ms. Finley's post-conviction rights.

Even if Anders v. California does not apply to this situation because there is no federal right to the assistance of counsel, the interests underlying the Anders decision are similar to those involved where the state elects to extend the right to counsel in collateral proceedings. Therefore, in order to insure that indigents receive the same degree of protection as do nonindigents and have their post-conviction petitions

decided on the merits rather than arbitrarily, appointed counsel who seeks to withdraw should be required to indicate the extent of his examination of the record and the law, what possible issues were considered, and what led him to conclude that the issues were without merit. Furthermore, counsel should be required to show that the defendant has been made aware of the motion to withdraw and her right to respond. Adoption of such requirements will assure that indigents receive fair and equal treatment under state collateral procedures without unduly burdening appointed counsel, who will only be required to memorialize the process which led him to conclude that the issues lacked merit. Furthermore, such a procedure will provide the state courts with a sufficient record on which to evaluate

counsel's determination of the merits and thus insure that post-conviction claims will be decided by judicial officers rather than by appointed counsel.

CONCLUSION

Even assuming that the requirements of Anders v. California need not be applied to state collateral review proceedings because there is no federal constitutional right to the assistance of counsel, the interests underlying the Anders decision are similar to those protected by the Equal Protection and Due Process Clauses of the Fourteenth Amendment. Therefore, this Court should require that where a state has elected to provide appointed counsel for indigents in post-conviction proceedings, such counsel should not be permitted to withdraw because the issues lack merit unless he informs the court of the extent to which the record has been examined and what issues might be raised, and notifies the defendant of her right to respond in sufficient time to allow such a response.

Such a procedure would satisfy the requirements of due process and equal protection without unduly burdening either appointed counsel or the state court systems.

For the above-stated reason, this Court should affirm the relief granted below.

Respectfully submitted,

NATIONAL LEGAL AID AND
DEFENDER ASSOCIATION
1625 K Street, NW
Washington, D.C. 20006

By: DAVID P. BERGSCHNEIDER
Office of the State
Appellate Defender
300 East Monroe, Suite 102
Springfield, IL 62701
(217) 782-3654

-30-

No. 85-2099

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

COMMONWEALTH OF PENNSYLVANIA,

Petitioner,

—v.—

DOROTHY FINLEY,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPERIOR COURT OF PENNSYLVANIA

BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION AND THE CIVIL LIBERTIES UNION OF PENNSYLVANIA, *AMICI CURIAE* IN SUPPORT OF THE RESPONDENT

LARRY W. YACKLE
Counsel of Record
Boston University
School of Law
765 Commonwealth Avenue
Boston, MA 02215
(617) 353-2826

STEFAN PRESSER
American Civil Liberties
Union of Pennsylvania
Bourse Bldg., Suite 680
Independence Mall
Philadelphia, PA 19106
(215) 592-1513

ALVIN J. BRONSTEIN
VIVIAN O. BERGER
DAVID GOLDSTEIN
American Civil Liberties
Union
132 West 43rd Street
New York, NY 10036
(212) 944-9800

QUESTIONS PRESENTED

I.

Whether the writ of certiorari granted in this case should be dismissed because the judgment below rests upon an adequate and independent state law ground.

II.

Whether in a case such as this, in which a state undertakes to appoint counsel to represent an indigent applicant for state postconviction relief, the due process clause of the fourteenth amendment requires the state to supply counsel who performs as an advocate.

INTEREST OF AMICI CURIAE

The American Civil Liberties Union is a nationwide, nonpartisan organization of more than 250,000 persons, dedicated to preserving and protecting the civil rights and civil liberties guaranteed by law. The ACLU of Pennsylvania is one of its state affiliates.

The ACLU and its affiliates have long worked to protect the rights of criminal defendants and have filed many briefs, as counsel for a litigant or as amicus curiae, in criminal cases requiring the interpretation of federal constitutional provisions.

With the consent of the parties, indicated by letters lodged with the Clerk of this Court, we file this brief amici curiae in support of the respondent.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Constitutional Provisions and Statutes

Books

STATEMENT OF THE CASE

The procedural history of this case is described in the superior court's opinion below. Dorothy Finley was convicted after a bench trial. The Pennsylvania Supreme Court found her claims on appeal (that some evidence admitted against her had been seized illegally and that the prosecution's evidence was insufficient for conviction) to be without merit. Later, Finley raised the same claims in a pro se application for collateral relief pursuant to the Pennsylvania Postconviction Hearing Act. The trial court denied relief summarily, but the state supreme court remanded on the ground that Finley, if indigent, had been denied her state law right to the appointment of counsel to assist her in the pursuit of postconviction relief in state court. J.A. at 7-8.

The state supreme court instructed the trial court to investigate Finley's financial status and, if she was found to qualify for assigned counsel, to appoint an attorney to represent her. The court was clear that appointed counsel would not be limited to the claims that Finley herself had raised, but would "explore legal grounds," "investigate underlying facts," and "articulate claims." Performance of that kind, the court said, would "promote efficient administration of justice" in Pennsylvania. The court stated expressly that, if counsel were appointed, the prisoner would be permitted to amend her pro se petition. J.A. at 8.

The trial court appointed an attorney, Michael A. Seidman, who met with Finley and read the "Notes of Testimony" at trial, consisting of the trial transcript. Seidman concluded that he could find no

issues of "arguable merit" to raise on Finley's behalf. He then sought advice from the trial court, which suggested that Seidman write a letter to the court describing his work and explaining why his client's claims were meritless. Then, the trial court itself would conduct "its own independent review" and, if the court agreed with Seidman, the court would dismiss Finley's petition without a hearing. Seidman wrote such a letter, the trial court dismissed Finley's petition without a hearing, and new counsel was appointed for an appeal. That appeal produced the superior court judgment under review here.

The superior court held that the trial court's indulgence of Seidman's superficial performance denied Finley the "meaningful" participation of counsel to which she was

entitled. The court explained that indigent applicants for postconviction relief in Pennsylvania have a right to appointed counsel who act as advocates, not to tell the state courts why claims are not meritorious. In this case, Seidman had a duty to explore possible claims apart from those already considered on appeal and to pursue any arguable issues in a professional manner. If no such claims existed, the superior court acknowledged that Seidman might ask to be relieved, but in that instance he would have a duty to inform Finley of his views in order to permit her to proceed on her own.

Seidman's performance failed on both counts. He did not look outside the record. Indeed, he did not explore even the record thoroughly and thus overlooked several issues that Finley's new attorney,

Catherine M. Harper, uncovered when she was assigned to this case after Seidman was allowed to withdraw. Moreover, Seidman did not notify his client of his views regarding her claims in order to permit her to proceed on her own behalf. As a result, she suffered summary dismissal. Accordingly, the superior court held that the procedure adopted by the trial court to accommodate Seidman deprived Finley of her right to adequate representation and remanded with instructions to hold an evidentiary hearing on the claims that Harper identified.

SUMMARY OF ARGUMENT

The superior court judgment under review in this case represents a genuine effort on the part of the Pennsylvania appellate courts to orchestrate the adjudication of federal constitutional claims within the state court system. Most federal claims, to be sure, are identified and determined at trial and on direct review. Others escape early detection and can only be treated in collateral proceedings.

To ensure that such claims are identified and adjudicated fully and fairly, Pennsylvania has established a postconviction motion procedure for use by state prisoners and has guaranteed the appointment of counsel to represent those unable to hire lawyers of their choice. The appointment of counsel is not merely a

matter of form; lawyers are provided to indigent prisoners to ensure that arguable claims are identified, developed, and put to the state courts in a professional manner. It follows that counsel appointed under these circumstances must be held to a reasonable standard of performance. The Pennsylvania appellate courts have long held that not only sound state policy, but the fourteenth amendment furnishes minimal standards that counsel must meet. Thus, in reviewing the trial court's accommodation of Mr. Seidman in this case, the superior court referred to this Court's decision in Anders v. California, 386 U.S. 738 (1967), in which the due process clause was interpreted in analogous circumstances.

If the superior court's judgment is to be reversed, it can only be because Pennsylvania's assimilation of Anders into

its postconviction remedial scheme has so skewed the meaning of due process in this context that this Court must disturb a state appellate court's decision to order a state trial court to hold an evidentiary hearing to consider arguable federal claims for collateral relief. Nothing in this case warrants such extraordinary action. On the contrary, when the salient features of the superior court's analysis are examined, the validity of that court's judgment can readily be seen.

On the understanding that the Court prefers that jurisdictional issues be treated in advance of arguments on the merits, we explain at the outset that the writ of certiorari was granted improvidently in this case and should be dismissed--because the judgment below rests upon an adequate and independent state law

ground. Next, turning to the merits, we make an argument in three parts.

First, we explain that the fourteenth amendment is implicated by appointed counsel's poor performance, whether or not the Constitution required the assignment of counsel in the first instance. The superficial contention that federal performance standards are unavailable merely because counsel was appointed pursuant to state law amounts to the unexamined assumption that the "greater" power to refuse counsel to an indigent includes the "lesser" power to promise an advocate, yet to deliver an adversary. That line of argument misconceives the nature of the state's assumed "powers" and constitutes, in effect, an attempt to revive the "right-privilege" distinction long since laid to rest. Nothing in this

Court's decision in Wainwright v. Torna, 455 U.S. 586 (1982), supports any such thesis.

Second, we explain that the state appellate courts in Pennsylvania have quite properly required appointed counsel in postconviction proceedings to perform as advocates. In this context, counsel has a duty to investigate arguable claims not treated at trial or on appeal, to explore them, and to present them in the manner most advantageous to the client. The state courts reasonably looked to analogous precedents like Anders in determining and applying appropriate performance standards for counsel in state collateral proceedings. To describe the question of Anders' significance in this context as the question whether that decision "applies" to state postconviction proceedings is to

misconceive the way in which Anders was invoked below.

Third, we put this case in institutional perspective and appraise its implications for the distribution of decision-making responsibility between the state courts on the one hand and the federal habeas corpus courts on the other. We engage the misguided thesis that deference to the Pennsylvania courts in this instance would create incentives for frivolous litigation in the federal forum and explain, by contrast, that an affirmance of the judgment below would foster full and fair state court adjudication of federal claims, thereby avoiding, in many instances, the need for subsequent federal litigation.

ARGUMENT

I.

THE WRIT OF CERTIORARI GRANTED IN THIS CASE SHOULD BE DISMISSED BECAUSE THE JUDGMENT BELOW RESTS UPON AN ADEQUATE AND INDEPENDENT STATE GROUND

We understand that the Court prefers that jurisdictional issues be treated prior to arguments on the merits. Accordingly, we begin with the question whether the writ in this case should be dismissed as improvidently granted. We think it should be--because the judgment below rests upon an adequate and independent state law ground of decision. Murdock v. City of Memphis, 87 U.S. 590 (1874). As required by this Court's decision in Michigan v. Long, 463 U.S. 1032 (1983), the superior court explicitly denominated the state law ground of its decision and explained the place of federal precedents, like Anders v.

California, supra, in plain language:

> Pennsylvania law concerning procedures to be followed when a court-appointed attorney sees no basis for an appeal is derived from the seminal case of Anders....J.A. at 21 (emphasis supplied).

To acknowledge that state law was "derived from" one of this Court's precedents is merely to describe an historical evolution; it is hardly to translate what is a matter of state law into something federal.

On the particular question of the role of counsel in postconviction proceedings, moreover, the superior court relied flatly on the relevant Pennsylvania rule:

> Pa. R. Crim. P. 1504, in affording counsel, means that counsel should act as an advocate in fulfilling his role. J.A. at 24 (emphasis supplied).

The rules under which counsel is provided to indigents in Pennsylvania postconviction proceedings were promulgated well after Anders was decided. If Pennsylvania chooses as a matter of state

policy to establish a right to counsel for indigents in postconviction proceedings and a concomitant right to the services of a genuine advocate, the essential character of that policy as one of state law is hardly altered by the mere existence of an earlier decision from this Court in an analogous field--even if Pennsylvania may have been influenced by that decision, even if, indeed, the Pennsylvania rules and subsequent case law amount to an incorporation of the federal decision into state law. State law is not federal because it was fashioned, like all state law, against the general backdrop of this Court's interpretations of the Constitution.

Notwithstanding the superior court's clear language, the state's attorney insists that the basis of the judgment below was federal. Indeed, as the state's

attorney portrays the matter, the superior court took the action it did only because it believed that a remand was "constitutionally required" in light of the Anders case, a precedent from this Court sufficiently in point to control the disposition here. Brief for Petitioner at 11-12.

The state's attorney fundamentally misconceives the way in which the Anders decision was implicated below.[1] First, the superior court did not grudgingly acquiesce in a constitutional decision from this Court that seemed to make unreasonable, but nonetheless unavoidable, demands upon assigned counsel in

---

1 The superior court's opinion does include the statement that the "application" of Anders to this case is "proper." J.A. at 24. That statement must be taken in context, however; we characterize that context in the text next following.

postconviction proceedings. Rather, the superior court affirmatively stated, explored, and decided the substantive question at bar: whether the trial court's behavior comported with state law. Nothing in the opinion under review here remotely supports the thesis that Pennsylvania feels compelled to tolerate Anders in this context against the better judgment of state authorities, or that Pennsylvania yearns for the "freedom" to embrace the procedure followed by the trial court in this case. The judgment below rests on a considered evaluation of competing substantive concerns, not an arid citation of federal precedent.

Second, the superior court did not rest on Anders, even as an analogous precedent, in isolation from other cases in point, but rather as a part of a larger, richer body

of settled understandings in Pennsylvania about the proper role of counsel in postconviction proceedings. The state's attorney fails to comprehend the manner in which Anders has been assimilated into the relevant line of Pennsylvania cases and, into the bargain, the extent to which the expectations of counsel articulated in Anders have matured into the mandate of state law.

A review of Pennsylvania state decisions in point, handed down before and after Anders, reveals beyond question the state law basis for the body of law on which the superior court rested its judgment in this case. When the Pennsylvania Supreme Court first took account of Anders in Commonwealth v. Baker, 429 Pa. 209, 239 A.2d 201 (1968), the court was quick to point out that earlier

Pennsylvania decisions, notably Commonwealth ex rel. Cunningham v. Maroney, 421 Pa. 157, 218 A.2d 811 (1966), had already held, as a matter of state law, that appointed counsel must perform as an effective advocate.

The Pennsylvania courts, moreover, have often referred to Anders in circumstances quite apart from the appellate context in which that case was decided. E.g., Commonwealth v. Thomas, 511 A.2d 200 (Pa. Super. 1986) (demanding effective advocacy from counsel appointed in parole revocation proceedings). No one would seriously contend that the state courts felt themselves controlled in such cases by the mere existence of a plainly distinguishable federal precedent. On the contrary, Pennsylvania standards for counsel's behavior are clearly grounded in state law

which, as the state courts' citation to Anders makes plain, is thought in Pennsylvania to be consistent with federal standards in analogous circumstances.

This is nowhere more clear than in Pennsylvania's cases regarding appointed counsel in postconviction proceedings. Those decisions are replete with explicit statements of controlling state law. E.g., Commonwealth v. Fiero, 462 Pa. 409, 341 A.2d 448, 450 (1975) (holding that "the mandate of section 12 of the Post-Conviction Hearing Act" had not been met); Commonwealth v. Green, 513 A.2d 1008, 1013-14 n. 7 (Pa. Super. 1986) (relying on "the assistance of counsel which Pennsylvania law requires"). Indeed, in the leading case, Commonwealth v. Mitchell, 427 Pa. 395, 235 A.2d 148 (1967), the Pennsylvania Supreme Court explained the

state law requirement that effective counsel be appointed in state postconviction proceedings by reference to the American Bar Association's suggested standards.

Thus it is inaccurate to speak of Anders as an extraneous, coercive order trom this Court to handle some matters in a particular way--an order that must be respected and to which the state's own preferences must be subordinated. On the contrary, Anders forms a part of Pennsylvania's general approach to postconviction remedies. Any attempt now to pluck Anders out of its place in Pennsylvania postconviction law would not free that state to choose its own course, out would frustrate the policies the state has already chosen.

It is, then, too late in the day to propose, as does the state's attorney here,

that the elaborate Pennsylvania system of providing effective counsel to indigents in postconviction proceedings is only a lock-step adherence to federal precedent. The judgment below rests on state law grounds, reflected in a range of state law authorities. Accordingly, the writ of certiorari was improvidently granted in this case and should be dismissed.

II.

APPOINTED COUNSEL'S INCOMPETENT PERFORMANCE IMPLICATES THE FOURTEENTH AMENDMENT WHETHER OR NOT THE FEDERAL CONSTITUTION REQUIRED THE ASSIGNMENT OF COUNSEL IN THE FIRST INSTANCE

A. A state has no "greater" power to deny appointed counsel in the first instance that includes a "lesser" power to provide an attorney who performs incompetently

It is a commonplace that a state's unilateral decision to extend benefits to its citizens in the absence of a federal constitutional obligation to do so can nonetheless trigger constitutional standards under which the state's policies must be carried out. Indeed, inasmuch as the Constitution imposes comparatively few affirmative obligations on the states, instances in which federal standards come into play to ensure fairness and

rationality at the implementation stage are routine rather than exceptional. This is the message of this Court's numerous procedural due process decisions.

Here, Pennsylvania chose to establish a postconviction remedy for use by prisoners and chose as well to make counsel available to indigents like Finley.[2] In this, the

---

[2] There is no occasion in this case to decide whether the states must provide state postconviction remedies for federal claims, cf., Case v. Nebraska, 381 U.S. 336 (1965) (pretermitting the issue), or whether indigent applicants for state postconviction relief are uniformly entitled to assigned counsel. Cf., Douglas v. California, 372 U.S. 353 (1963) (holding that counsel must be appointed on first appeal as of right). It is important to note with respect to the latter question, however, that in Pennsylvania a prisoner's access to postconviction proceedings is not discretionary, but a matter of right. The state postconviction courts, then, have plenary power to correct errors of fact or law made in the course of trial or appellate review. This is in marked contrast to the function of discretionary appellate review with which this Court was concerned in Ross v. Moffitt, 417 U.S. 600 (1974).

state plainly meant not only to treat indigent prisoners fairly, but also to ensure that state collateral process would be employed effectively--the better to further the state's objective that federal claims be fully and fairly adjudicated within the state court system. Thus the state supreme court said explicitly that counsel's participation would "promote efficient administration of justice" in Pennsylvania. J.A. at 8. Cf. Sumner v. Mata, 449 U.S. 539 (1981) (relying on state courts for this purpose). Having created such an opportunity to litigate and having held out the promise of professional representation to prisoners too poor to hire their own lawyers, the state was constitutionally responsible to keep the doors of its postconviction courts free of arbitrary obstacles and to provide genuine

advocates to those prisoners to whom the state promised assigned counsel.

In the case at bar, of course, Pennsylvania has attempted to do just that. When the trial court originally failed to appoint an attorney on Finley's behalf, the Pennsylvania Supreme Court remanded with instructions to assign a lawyer to represent her. And when the trial court permitted Mr. Seidman to forego performance as a genuine advocate and, instead, to file a "no merit" letter, the superior court remanded yet again. A state cannot hold out to impoverished inmates the promise of an attorney sworn to represent them with zeal and then renege--by, in fact, providing a lawyer who, while allowing his client to rely on his services to her detriment, actually advises the court that her claims are not worth

pursuing and then stands idly by as her action is summarily dismissed. That is the practice in which the trial court engaged. The superior court rejected such a procedure, as well it might; yet the state's attorney now asks this Court to approve it.

The state's attorney's primary argument amounts to a superficial invocation of a beguiling syllogism this Court has seen and rejected before: the greater power necessarily includes the lesser. E.g., Evitts v. Lucey, 469 U.S. 387, 105 S. Ct. 830 (1985). The state's attorney assumes that Pennsylvania might have refused to appoint an attorney to represent Finley in state postconviction proceedings. Accordingly, the state's attorney argues that the state (in the form of the trial court) was free to deliver whatever brand

of legal "services" the trial court saw fit to provide. The flaws in this analysis are easy enough to identify.

First, the state's attorney misconceives the nature of the state "powers" on which this argument depends and the relationship, if any, between them. The notion that the state's assumed ability to refuse indigent prisoners the assistance of counsel is a "greater" power, inclusive of a "lesser" power to deliver faulty legal services, is plainly in error. A state's assumed capacity to avoid difficulties simply by failing to take action is far from the "greater" authority the state's attorney suggests. A price would be exacted if the state were to deny counsel to indigents like Finley; the state would necessarily sacrifice its own interests in the thorough adjudication of federal claims

in state court. It is equally erroneous to propose that the assumed authority to provide only shoddy legal services is in any sense a "lesser" power in any event. Failing to deliver on a commitment to appoint an advocate to represent an indigent is no more a subset of refusing to provide counsel at all than malfeasance is a subset of nonfeasance.

Second, the state's attorney's argument constitutes, in effect, a belated attempt to resurrect the long-rejected "right-privilege" distinction in constitutional law. The notion that, having chosen to protect its own as well as prisoners' interests by promising the appointment of counsel in postconviction proceedings, a state is free to breach that promise at will ignores, once again, the well-settled understanding that the

Constitution fixes minimal standards governing the way in which the states pursue their self-chosen policies. Arbitrariness and unfairness are plainly forbidden whenever the state acts with respect to individual liberty.

Third, the state's attorney's argument offers to prove altogether too much. If the state's ability to withhold counsel in the first instance were sufficient justification for any flaw in the performance of assigned counsel, it would follow that the trial court might have allowed Mr. Seidman to accept an appointment, to do nothing with respect to the case, and thus to leave his client waiting in her cell for word that would never come. No one would seriously contend that the Constitution would permit the trial court so to mistreat a litigant, much

less on the theory that Pennsylvania might have declined to appoint counsel initially.[3]

B. This case does not implicate the rationale of Wainwright v. Torna

Nothing in Wainwright v. Torna, supra, supports the state's attorney's remarkable assertion that if a state need not promise at all, it can make and break promises without constitutional fetter. The prisoner in Torna sought discretionary review on certiorari in the Florida Supreme Court. That court was not a court of error for ordinary criminal cases; certiorari review was reserved, under state law, for cases presenting questions of general or

---

3 The state's attorney raises another version of this argument in connection with an attempt to distinguish Anders, supra, from the case at bar. We treat that argument infra, at 40-45.

institutional significance. In circumstances of that kind, this Court had held a decade earlier that counsel need not be appointed for indigents. Ross v. Moffitt, supra. The per curiam in Torna concluded, accordingly, that the failure of a prisoner's retained counsel to file a timely petition did not constitute ineffective assistance of counsel in violation of the fourteenth amendment.

In this case, by contrast, Finley sought not discretionary review before a court charged to treat only questions of widespread interest, but effective access to a state postconviction court--made available routinely for the correction of constitutional errors at trial or on appeal. The Constitution may permit the states to establish a form of appellate jurisdiction after the fashion of this

Court's own certiorari practice, to reserve such an appellate process for special cases, and, in so doing, to overlook the defaults of counsel retained by prisoners hoping that their cases will be chosen for review. When, however, a state opens an avenue of attack to accommodate routine cases for the correction of errors, a prisoner's claim to effective representation is greatly enhanced. In Torna itself, this Court left open the question whether the prisoner in that case might have been constitutionally entitled to effective representation if he had sought appellate review to which he was entitled as a matter of state law right. 455 U.S. at 587 n. 3.

More fundamentally, the prisoner in Torna had retained an attorney who, in turn, failed to file a seasonable

application. He thus injected retained counsel into state proceedings in which, by hypothesis, counsel was not essential to ensure fundamental fairness, and then sought to hold the state responsible for that retained lawyer's misconduct. Here, by contrast, Finley did not attempt to manufacture a constitutional claim by introducing her own attorney and then ascribing his misbehavior to the state. She merely accepted the state's promise to provide her with a professional advocate, relied upon that attorney to do his job, and then fairly complained to the state wnen he abandoned her without notice and, in effect, became her adversary by advising the court that her action should be summarily dismissed.

This is the very case Torna was not--a case in which the state (that is, the state

trial court) deprived a litigant of a state law right of access to the state courts. Id. at 588 n. 4. Because Seidman was assigned to represent Finley by the trial court, and because that court then suggested, orchestrated, and rested upon performance by Seidman falling below minimal standards, there was a breach of faith in this case, ascribable to the trial court, that did not exist in Torna. That breach of faith furnishes the federal constitutional claim identified by the superior court below.[4]

---

[4] In drawing this distinction between Torna and the case at bar, we do not partake of the now-discarded contention that the standards of performance are different for assigned and retained counsel. See Cuyler v. Sullivan, 446 U.S. 335 (1980). Nor do we neglect this Court's decision, in a dramatically different context, that assigned attorneys assisting indigent litigants do not ordinarily act "under color of state law." Polk County v. Dodson, 454 U.S. 312 (1981).

III.

COUNSEL APPOINTED TO REPRESENT AN INDIGENT IN STATE POSTCONVICTION PROCEEDINGS MUST PERFORM AS AN ADVOCATE

A. The essence of counsel's role is advocacy

Once it is established that a state's practice of leading indigent applicants for postconviction relief to rely on appointed counsel is subject to constitutional requirements, the next question is the appropriate measure of counsel's responsibilities. At a minimum, due process requires that counsel must perform as an advocate. At its core, the American justice system is, after all, adversarial in nature. Americans, therefore, reasonably and rightly understand that the function of lawyering is advocacy. See Commonwealth v. Fiero, supra. When, accordingly, a lawyer is promised, the

lawyer that is expected is an advocate who takes the client's part with zeal. An attorney who advises only the court, rather than the client he is assigned to represent, is at best a mere amicus curiae--playing a role decidedly different from what the client has been led to expect. Indeed, as in this case, such an attorney is effectively his client's adversary.

Time and again, this Court has confirmed that counsel's advocacy role is critical to the maintenance of the adversarial model on which our courts depend. In the sixth amendment context, the Court said in Gideon v. Wainwright, 372 U.S. 335, 344 (1963), that lawyers are "necessities, not luxuries" in this adversarial system of justice; in Herring v. New York, 422 U.S. 853, 862 (1975), the

Court stated that the "very premise of our adversarial system...is that partisan advocacy on both sides of a case will best promote the ultimate objective that the guilty be convicted and innocent go free"; and, more recently in Strickland v. Washington, 466 U.S. 668, 688 (1984), the Court said that counsel owes to the client the duty to be loyal, to "advocate" the client's cause, and to "bring to bear such skill and knowledge as will render the trial a reliable adversarial testing process."

Similarly, in cases in which counsel's performance is measured against the fourteenth amendment of its own force, this Court has placed great emphasis upon the advocacy function. Only last Term, in Evitts v. Lucey, supra, at 835, the Court explained that counsel "must play the role

of an active advocate, rather than a mere friend of the court assisting in a detached evaluation" of clients' claims.

The concrete form that counsel's advocacy must take depends, of course, on the context in which professional services are needed. At trial, counsel attempts to persuade the trier of fact of the defendant's innocence; on direct review, counsel attempts to develop claims of arguable error identifiable in the record. At the collateral stage, counsel does what the Pennsylvania Supreme Court expressly described in this case. It is insufficient if counsel merely satisfies himself that the client is factually guilty or that claims arising from the record are nonmeritorious. Counsel has an obligation to investigate other arguable claims, to

explore them, and to present them in the most advantageous way from the client's point of view.

This is not to suggest that counsel must begin entirely afresh. The client may suggest facts that have legal significance, and prior proceedings have typically produced a record that can serve as the primary focus of counsel's examination. Yet counsel surely is obligated to work with the client to uncover information that may be useful and to examine the record thoroughly to detect arguable issues.

Nor is this to suggest that counsel must pursue claims reasonably found to be frivolous. That is not the law in this Court, see Jones v. Barnes, 463 U.S. 745 (1983); nor is it the law in Pennsylvania. Loosely-applied labels can create confusion in this context, and we hardly propose that

this Court should draw hair-fine distinctions between, for example, claims that are "frivolous" and those that are merely "nonmeritorious." The substance of the matter, however, is plain. Amici curiae may well guess at the probability that an arguable claim will be found meritorious and advise the court accordingly; advocates argue those claims and find out whether they will be sustained.

There is no magic formula for distinguishing claims that competent lawyers do and must pursue from those so thoroughly lacking in value that they can be discarded no matter how appealing they may seem to the client. It is quite clear, however, that only disciplined professional advocates who have invested sufficient time and effort in an attempt to uncover claims

to help their clients are in a position to judge the difference.

In the case at bar, the Pennsylvania Supreme Court instructed the trial court to appoint counsel to represent Ms. Finley as an advocate. The lawyer chosen, Mr. Seidman, did not fulfill that role. By his own account, he merely talked with his client and read notes on the testimony at trial. Nothing in his report suggests a careful exchange with Finley, calculated to elicit information pertinent to new collateral claims. Nor was his examination of the trial transcript an adequate substitute for sustained, rigorous investigation of the record in search of arguable claims. Ms. Harper's ability to identify claims of "arguable merit" provides powerful evidence that Seidman's work was superficial at best. Accordingly,

the superior court remanded with instructions to hold an evidentiary hearing on the claims identified by Harper. There is no reason to second-guess that entirely reasonable disposition.

B. Pennsylvania has relied upon Anders v. California only as an analogous precedent

The state's attorney apparently objects to the course of action taken below not because the state courts in Pennsylvania lack authority to order hearings in collateral proceedings when they find it advisable, but because the superior court partially explained its judgment by reference to Anders v. California, supra. Thus the state's attorney puts the question now before the Court as whether Anders "applies" to state postconviction proceedings. The choice at this juncture, according to the state's attorney, is between Anders'"formal requirements" or freedom on the part of Pennsylvania and other states to choose for themselves "what procedures can most meaningfully and fairly enforce state laws...." Brief for Petitioner at 22-23.

This, with deference, is not the choice at all. The truth of the matter is that Anders does not "apply" to this case in the wooden sense that the state's attorney seems to mean. That was a case about what the Constitution has to say about the duties of counsel appointed to pursue a first appeal. There are important similarities between the role of counsel on initial appeal, where the advocate must identify and press arguable claims appearing in the record, and the role of counsel in collateral proceedings, where the advocate must explore other claims. Those similarities more than explain the superior court's reference to Anders. Yet it would be a mistake--a mistake not made below--to propose that appointed counsel's obligations here track neatly counsel's responsibilities there. Thus the Pennsylvania Supreme Court in this case was

at pains to explain the duties of assigned counsel in Pennsylvania postconviction proceedings. See p. 2 supra.

Still, having insisted that the question in this case is whether Anders "extends" to state postconviction proceedings, the state's attorney launches a forthright assault on Anders itself. It is argued, for example, that Anders is "confused," and "unworkable," that counsel is placed in a "dilemma," and that Anders is "schizophrenic." Brief for Petitioner at 12-14. These charges are leveled not to ask that Anders be overruled here and now; such a request would be inappropriate in a case in which Anders is involved only as an analogous precedent. They are raised, instead, in support of the thesis that it would be "impractical, unwise, and constitutionally unnecessary" to require counsel in state postconviction proceedings to do precisely what counsel must do, under

Anders, on direct review. Id. at 12. This, again, is a straw man.

Apart from attacking Anders in its own field, the state's attorney offers one basis for distinguishing that case from this--that Anders was merely an adjunct to Douglas v. California, supra, in which this Court held that counsel must routinely be appointed to represent indigents on first appeal as of right. Again assuming that there is no similarly routine federal right to counsel in state postconviction proceedings, the state's attorney contends that Anders has no postconviction analogue. This argument apparently understands Douglas to have created a free-standing constitutional right to counsel on appeal, which was then embellished by Anders. By this account, Evitts, supra, was also a mere elaboration

of Douglas. Yet Douglas, like Griffin v. Illinois, 351 U.S. 12 (1956) (involving transcripts of trial), was itself in aid of a prior federal right, grounded in due process, to fair access to state appellate process. And, of course, this Court has declined thus far to hold that the states are constitutionally obliged to establish appellate review in criminal cases. See McKane v. Durston, 153 U.S. 684 (1894).

The beginning of wisdom in understanding all these cases, Griffin, Douglas, Evitts, and Anders, is the recognition that they are all unremarkable interpretations of the due process clause in various, similar circumstances.[5] They are not isolated creations by this Court of

---

5 Although the equal protection clause figured in the opinions in Griffin, Douglas, and Anders, this Court has more recently placed emphasis on the due process component of those decisions. E.g., Evitts, supra, at 840-41.

independent constitutional rights accompanied by ancillary definitions of the scope of those rights. Douglas did not create an independent right to counsel on appeal any more than Griffin created an independent right to a transcript of trial. Anders did not further define Douglas any more than did Evitts. In each of these instances, the Court merely prescribed the process that was due constitutionally. The same task is before the Court in this case.

IV.

HOLDING APPOINTED COUNSEL TO MINIMAL CONSTITUTIONAL STANDARDS WILL FOSTER FULL AND FAIR ADJUDICATION OF FEDERAL CLAIMS IN STATE COURT AND THUS AVOID LITIGATION OF SUCH CLAIMS IN FEDERAL HABEAS CORPUS

Habeas corpus for state prisoners nas come under criticism in recent years for permitting applicants to press federal claims in the federal forum when, for some reason, those claims were overlooked or rejected in prior state court proceedings. Having noted such criticism, we hasten to point out that it has no place in this case. For in this instance the only federal claim immediately in issue touches not Ms. Finley's conviction, but the adequacy of the state court machinery for treating her federal claims. In order, in part, to make federal habeas litigation unnecessary in the run of cases,

Pennsylvania has established a workable and working scheme to ensure that federal claims will be identified in state court and that they will be fully and fairly adjudicated there--with the vital assistance of assigned advocates for indigents.

If this Court were now to frustrate the state's scheme merely because federal decisions have been woven into state standards over the years, the result would be more federal habeas litigation at the behest of prisoners who, for want of effective representation in state court, suffer dismissal regarding claims that may well be meritorious. If, on the other hand, this Court affirms the judgment below, the courts of Pennsylvania will continue their efforts to resolve federal claims in state court, thus reducing

prisoners' incentives to seek relief elsewhere.

It may be helpful to think of the question at bar within the context of the "process" model of federal-state relations much discussed in the literature. E.g., P. Bator, P. Mishkin, D. Shapiro & H. Wechsler, Hart and Wechsler's The Federal Courts and the Federal System 1467-68 (2d. ed. 1973). Observers who doubt the wisdom of the congressional plan to provide state prisoners with an opportunity to litigate in federal habeas as a routine sequel to state court litigation typically justify their position on the assumption that state courts can be counted upon to determine federal claims correctly. Those same observers suspend that assumption, however, in cases in which state court outcomes are produced by way of flawed procedural

machinery. The appropriate occasion for federal adjudication, on this model, is to ensure the adequacy of state court procedures rather than the accuracy of state court judgments reached through sound process. The application of this "process" model to the case at bar is plain enough. The crux of the problem in this case is not whether the state courts have correctly determined a federal claim for relief, but whether those courts' efforts to shore up their machinery for treating federal claims will be sustained.

Congress has adopted something like the "process" model with respect to fact-finding in state court. See 28 U.S.C. § 2254(d) (establishing a presumption of correctness in favor of primary facts found in state court after a full and fair evidentiary hearing). The framework

envisioned by § 2254(d) would be frustrated if the state court machinery for determining facts were not up to the task and, accordingly, state factual findings were not entitled to respect in the federal forum. Accordingly, it makes all the sense in the world to encourage states like Pennsylvania in their efforts to establish and maintain genuinely solid state court process for the adjudication of factual issues that would otherwise have to be determined in federal habeas.

Moreover, this Court has remarked on the relationship between § 2254(d) and the exhaustion doctrine in federal habeas corpus. E.g., Rose v. Lundy, 455 U.S. 509, 519 (1982). If state court fact-finding machinery is reliable, state litigation of the substantive legal questions to which primary facts relate can build a firm

record and thus render federal adjudication of those substantive claims more efficient--if and when a prisoner seeks habeas relief. Once again, then, the distribution of decision-making authority between the state and federal courts, established by Congress in statutes like § 2254(d) and underscored by this Court's decisions in point, would be furthered by affirming a state's good faith attempts to ensure that its courts play the role assigned to them.

We understand, of course, that an affirmance of the judgment below would recognize that the Constitution has meaning with respect to the performance of assigned counsel in state postconviction proceedings and, therefore, that some disappointed prisoners might raise claims going to the effectiveness of such counsel in later

petitions for federal habeas relief.[6] Yet it would make no sense for this Court to deny that the Constitution requires advocates in this context merely to eliminate potential habeas litigation on such claims. That course would inflate the significance of future habeas litigation touching this particular claim out of all proportion to the far more important gains for the judicial system flowing from the encouragement of thoroughgoing adjudication

---

6 Some language in a handful of lower federal court opinions suggests that claims going to prisoners' treatment in state postconviction proceedings are not cognizable in federal habeas corpus because they cannot, even if meritorious, entitle applicants to federal relief from an underlying detention. E.g., Mitchell v. Wyrick, 727 F.2d 773, 774 (8th Cir. 1984). Talk of that kind is misleading. This Court has often addressed claims related only to the administration of state remedial schemes and has approved the award

of federal claims in state court. The fact is that the mere recognition that appointed counsel must behave as advocates would generate relatively few claims of misfeasance, in part because the state courts, too, will police counsel's performance. The present case is itself an illustration.

Some may be tempted to see the problem at bar differently--as the opportunity to seal a rough compromise between prisoners' demonstrable need for professional representation on the one hand and concerns

---

of habeas relief conditional upon the willingness and ability of state authorities to cure federal error occurring in state proceedings after sentencing. If, indeed, habeas were unavailable to prisoners complaining of constitutional violations arising from the manner of state court treatment of other federal claims, the Evitts decision would have to be reexamined.

regarding the costs of postconviction litigation on the other. Thus it may be proposed that it is enough that indigent prisoners are entitled to effective counsel on appeal and that a similar entitlement in state collateral proceedings is unjustified by the gains, measured against the costs, of ensuring the availability of advocates at that further stage. The appeal of any such compromise is, at best, only superficial. For it takes as its premise that the Court can read the Constitution out of state postconviction proceedings entirely. That the Court cannot do--without paying a very high price.

There is a sense in which this is the paradigm of a "bad facts" case--the kind of case in which an abstract claim of right is at its weakest. The state's attorney portrays Ms. Finley as the notorious "Black

Dot," who has been accorded the assistance of three different appointed attorneys in state postconviction proceedings (the lawyer who handled the appeal from the dismissal of her initial application for relief, Mr. Seidman, and Ms. Harper) and who insists nonetheless that she is constitutionally entitled to still further assistance from the Commonwealth of Pennsylvania. On close examination, however, the truth becomes clear.

Dorothy Finley stands convicted in Pennsylvania notwithstanding that Pennsylvania's appellate courts have recognized several arguable grounds for asserting that her conviction was obtained in violation of the United States Constitution. Those claims have never been considered in a Pennsylvania court, indeed, in any court. The judgment under review

now is neither more nor less than a state appellate court order that a state trial court take up those claims, consider them fully and fairly with the assistance of a professional advocate on Finley's behalf, and decide them consistent with the state courts' responsibility to enforce federal law.

The sheer number of appointed attorneys in this case is wholly misleading. The three attorneys appointed by the trial court were for the most part introduced only because that court refused to do what state law plainly required. The original attorney was necessary only because the trial court neglected to appoint an attorney to help Finley marshal her claims and file an effective postconviction application. Seidman was properly appointed, but Harper was recruited to

service only because the trial court failed to hold Seidman to the job he was assigned to perform.

This case can be clearly understood only if the Court notes what would have happened if the trial court had followed state law from the outset. The answer to that question is plain enough: The trial court would have appointed an effective advocate to represent Finley at the investigation stage of state postconviction proceedings. It would not have been necessary, then, to appoint an attorney to handle an appeal from the denial of such counsel; nor, certainly, would it have been necessary to appoint an attorney to seek appellate review of another attorney's poor performance. In sum, what happened below happened only because of the trial court's recalcitrance in the teeth of state law. And to this day, three postconviction

attorneys later, Dorothy Finley still has not had a lawyer charged actually to do what the law in Pennsylvania guarantees a lawyer will do on her behalf--investigate, identify, marshal, and pursue arguable claims that were not treated at trial and on direct review. On the contrary, Ms. Finley has suffered yet another summary dismissal because of the trial court's refusal to respect her state law rights.

CONCLUSION

We urge the Court to dismiss the writ of certiorari as improvidently granted. If the Court reaches the merits, we urge the Court to affirm the superior court judgment below.

LARRY W. YACKLE
Counsel of Record
Boston University
School of Law
765 Commonwealth Avenue
Boston, Massachusetts 02215
(617) 353-2826

ALVIN J. BRONSTEIN
VIVIAN O. BERGER
DAVID GOLDSTEIN
American Civil Liberties Union
132 West 43rd Street
New York, New York 10036
(212) 944-9800

STEFAN PRESSER
American Civil Liberties
Union of Pennsylvania
Bourse Bldg., Suite 680
Independence Mall
Philadelphia, PA. 19106
(215) 592-1513